

I Want to Speak Like a Native Speaker: The Case for Lowering the Plaintiff's Burden of Proof in Title VII Accent Discrimination Cases

GERRIT B. SMITH*

Discrimination on the basis of a person's foreign accent has been found to be prohibited in certain instances under Title VII of the 1964 Civil Rights Act. With the steady influx of non-native speakers of English into the United States, this area of the law is likely to see an increase in litigation in the coming years. However, more often than not, plaintiffs in accent discrimination cases are unsuccessful in winning their claim. Using linguistic, demographic, and economic research, this Note argues that a plaintiff's burden of proving accent discrimination should be lowered, in order to deter employers from discriminating against accented speakers. This in turn would better integrate immigrants into American society, allowing them to reach their full potential, at least in terms of employment.

This Note further argues that one possible way of improving a plaintiff's chances in accent discrimination cases is by statutorily excluding defendant's customer preference arguments and lay people's opinions about the plaintiff's verbal comprehensibility at trial. While most Title VII litigation excludes customer preference defenses, these statements continue to be relied on by courts in accent discrimination cases. An exclusion of customer preference arguments in these cases would likely mean a greater focus on the actual strength of a person's English skills and potentially give plaintiffs a better chance to prevail at trial.

* Managing Editor, *Ohio State Law Journal*, 2004-05. A.B., magna cum laude, College of William & Mary, 1995; M.A., University of Hawaii at Manoa, 1999; M.P.A., University of Oklahoma, 2000; J.D., The Ohio State University Moritz College of Law, 2005 (expected). As with most things in life, this Note benefited from the help and support of a number of people. First, I would like to thank Professor L. Camille Hébert of the Moritz College of Law for reading the drafts of this Note, as well as for her suggestions and encouragement throughout the writing process. It was her employment discrimination class—my favorite class in law school—that provided the impetus for writing my Note on Title VII and accent discrimination. Furthermore, I would like to thank Professor Maryann Overstreet of the University of Hawaii at Manoa and George Yule for their helpful comments on the linguistic section of this Note. The Note also benefited from the suggestions during the early stages of this paper by former *Ohio State Law Journal* members Megan Boiarsky and John Wilson. I also need to thank my editor, Jason Hildenbrand, for all his work and patience during the editing process of this Note. Despite all of this generous assistance and support of others in helping me throughout the Note writing process, all remaining mistakes and shortcomings herein are my own. Finally, I dedicate this Note to my beloved family—my parents, Bruce and Gerlinde Smith, as well as my two sisters, Martina and Melissa. Without their unconditional love and support throughout all of my “adventures” none of this would have been possible. Thank you!

"I pray every night before I go to bed, I want to speak like a native speaker as soon as possible."¹

I. INTRODUCTION

Sophia Poskocil is a middle-aged woman and a native of Bogotá, Columbia. She received her high school and college education in Columbia and, though her native tongue is Spanish, she speaks English fluently. From 1989 through 1991, Poskocil attended Hollins College, in Virginia, on a part-time basis. She qualified for a teaching certification from the Virginia Department of Education. Moreover, she successfully worked part-time as an adjunct professor at Hollins College and in 1996 taught at Roanoke College in Virginia. From 1992 to 1998, she diligently pursued employment with the Roanoke County School Division and renewed her application annually. As part of her education program at Hollins College, Poskocil interned as a student-teacher at Northside High School in the Roanoke County School Division. Her supervisor at Northside, Karen Lavinder, praised Poskocil for her teaching skills and wrote strong recommendations on Poskocil's behalf. Despite these strong recommendations, Poskocil was unable to attain a regular part-time or full-time teaching position within Roanoke County.²

Over the span of six years, Poskocil applied to a total of nineteen positions with Roanoke County schools, but was denied employment each time. On March 20, 1996, she filed charges with the Equal Employment Opportunity Commission (EEOC) accusing the school division of national origin³ and age discrimination.⁴ During the trial, evidence was introduced that the school district based its decision not to hire Poskocil on student evaluations. Students in Poskocil's Northside High School class complained that Poskocil was difficult to understand because of her foreign accent. In their evaluations, students wrote, among other things, that the "instructor [Sophia Poskocil] *barely spoke* English, [and] was hard to understand."⁵

Ultimately, the district court granted summary judgment in favor of the school district, stating that the plaintiff failed to demonstrate that the county

¹ *Coming to America—Eye-Opening Experiences Mold Young Immigrants*, SEATTLE TIMES, June 2, 1992, at F3 [hereinafter *Coming to America*] (spoken by Young Park, a Korean immigrant). The quotation in the title of this Note is taken in part from Park's longer quote cited herein.

² Poskocil v. Roanoke County Sch. Div., No. 98-0216-R, 1999 U.S. Dist. LEXIS 259, *2-3 (W.D. Va. Jan. 11, 1999).

³ "National origin discrimination includes discrimination based upon a person's foreign accent." *Poskocil*, 1999 U.S. Dist. LEXIS 259, at *10-11.

⁴ *Id.* at *4-5.

⁵ *Id.* at *5 (emphasis added). Other comments in the evaluations included that "the material was covered way too quickly making the students not understand the language well and gradually got worse," or "the teacher's lack of English made it hard to ask questions." *Id.*

discriminated against her.⁶ What is disturbing about the case is that Poskocil was not applying to teach a high school English class, which might have made the students' complaints more relevant, but rather Poskocil was applying to teach Spanish classes.⁷ Moreover, it appears that no one at her trial had a difficult time understanding her. However, her apparently substantial foreign accent and the school district's argument that Poskocil's accent interfered with her communication skills led the *Poskocil* court to find that Roanoke County relied on a legitimate non-discriminatory reason for not hiring her.⁸

To be sure, there are countless Sophia Poskocils whose stories never make it into the hallowed halls of U.S. courts, let alone into the pages of law review articles. Proving discrimination under the Title VII proof scheme is a difficult task, as evidenced by the discussion of the case above.⁹ This Note will take a critical look at the developments in Title VII foreign accent¹⁰ discrimination cases. I will argue that rapid changes in the demographic landscape of the United States, specifically the increased influx of immigrants from non-English speaking countries, makes combating accent discrimination¹¹ more important than ever. Because of the increase of non-native speakers looking to enter the American workforce, the likelihood of incidents of accent discrimination—or at least perceived incidents of accent discrimination—will increase and with it litigation. While skilled and educated immigrants like Poskocil will likely not make up the majority of people coming to this country in the future, they undoubtedly

⁶ *Id.* at *7.

⁷ *Id.* at *3.

⁸ *Id.* at *13–14.

⁹ Another example supporting this argument is the most famous accent discrimination case to date, *Fragante v. City & County of Honolulu*, 699 F. Supp. 1429 (D. Haw. 1987), *aff'd*, 888 F.2d 591 (9th Cir. 1988). There an attempt was made to dissuade the plaintiff from pursuing his claim. The lawyers at the public interest law firm that would ultimately represent Mr. Fragante noticed that he had a strong case. However, they advised him that Title VII litigation is costly and difficult and that money damages in such cases tend to be nominal. Nevertheless, Mr. Fragante informed them that he was prepared for a fight. The lawyers were impressed by his passion and ultimately accepted the challenge. Mari J. Matsuda, *Voices of America: Accent, Antidiscrimination Law, and a Jurisprudence for the Last Reconstruction*, 100 YALE L.J. 1329, 1334 (1991).

¹⁰ For the purposes of this note “foreign accent” will mean speaking American English with a foreign accent. As Professor Maryann Overstreet and George Yule have pointed out to me, “a Scottish English speaker could have a foreign accent and yet still be a native speaker of English.” Letter from Maryann Overstreet & George Yule, to author (Aug. 26, 2004) (on file with author). For a greater discussion on the development of a foreign accent see *infra* Part III.A.

¹¹ For stylistic purposes this Note will use the term “accent discrimination” to mean “foreign accent discrimination.”

represent a growing number in the workforce.¹² This Note will argue that discriminating against non-native speakers based on their foreign accent has serious repercussions for non-native speakers, as otherwise qualified individuals are encouraged or even forced to take lower paying jobs, because of their perceived communication problems. As a result of the prejudice toward foreign accented speakers, many immigrants face a negative economic impact on themselves and their families.¹³

I will also argue in this Note that the first step in remedying this injustice and making it easier for plaintiffs to win foreign accent discrimination cases is to have courts vigilantly exclude customer preference arguments—such as the student evaluations in *Poskocil*—that operate as a partial defense to foreign accent discrimination and do nothing more than detract from a sound inquiry of whether the plaintiff's English skills are sufficient to perform his or her job satisfactorily.¹⁴ Moreover, despite the general rejection of customer preference defenses by courts in other areas of Title VII cases,¹⁵ arguments that portray a prejudicial posture

¹² Immigrants are moving up the economic ladder and the traditionally mostly white, middle-class suburbs are becoming home to more minorities. Haya El Nasser & Paul Overberg, *Old Labels Just Don't Stick in 21st Century*, USA TODAY, Dec. 17, 2003, at 17A. While immigrants and minorities in general are moving up the pay scale and are a fast-growing sector of the electorate, many of the immigrants to this country are still unskilled workers. They tend to find work "in hotels, on farms, in construction and in other generally low-wage unskilled positions." Richard W. Stevenson & Steven Greenhouse, *Plan for Illegal Immigrant Workers Draws Fire From Two Sides*, N.Y. TIMES, Jan. 8, 2004, at A28.

¹³ Unlike Sophia Poskocil, who was unable to find a teaching position for some time, Manuel Fragante was able to secure a job with the State of Hawaii after he lost his claim in court. He was employed as a statistician shortly after losing his DMV job. Ironically his job involved conducting telephone interviews, further giving credence to the argument that the city misjudged the "interference" of his accent. Matsuda, *supra* note 9, at 1354.

¹⁴ Some commentators on this topic have thought about how to make the inquiry into whether a plaintiff has been discriminated against based on a person's foreign accent more objective. See, e.g., Carolyn R. Matthews, Comment, *Accent: Legitimate Nondiscriminatory Reason or Permission to Discriminate?*, 23 ARIZ. ST. L.J. 231, 256 (1991) (recommending that courts not defer to employers, but instead "consider (1) what level of communicative ability the job requires, and (2) whether the employer made a valid determination of whether the applicant or employee met the qualifications"); Beatrice Bich-Dao Nguyen, Comment, *Accent Discrimination and the Test of Spoken English: A Call for an Objective Assessment of the Comprehensibility of Nonnative Speakers*, 81 CAL. L. REV. 1325, 1346–52 (1993) (calling for the use of an objective test in accent discrimination cases—Test of Spoken English—to determine the comprehensibility of an individual's speech).

¹⁵ See, e.g., *Diaz v. Pan Am. World Airways, Inc.*, 442 F.2d 385, 389 (5th Cir. 1971) (rejecting airline's policy to exclude men from being flight attendants because of customer preference and noting that "it would be totally anomalous [to the purpose of Title VII] if we were to allow the preferences and prejudices of the customers to determine whether the sex discrimination was valid"); cf. *Jones v. Hinds Gen. Hosp.*, 666 F. Supp. 933, 937 (S.D. Miss. 1987) (allowing customer preference defense to justify a "bona fide occupational qualification"

toward the foreign accented speaker still permeate many accent discrimination cases.¹⁶

Only a few law review articles have dealt with the issue of Title VII and foreign accent discrimination.¹⁷ Many of them argue for more objective ways of dealing with linguistic discrimination.¹⁸ This Note will not only expand on this discussion, but in arguing for exclusion of nearly all employer and customer preference statements at trial,¹⁹ it arguably proposes one of the more radical approaches in trying to help plaintiffs prevail in Title VII accent discrimination cases.²⁰

This Note will be structured into several parts. Part II will discuss the statutory prohibitions against accent discrimination. While Title VII does not specifically address accent discrimination, it does prohibit discrimination on the basis of national origin. The EEOC, tasked with enforcing employment discrimination laws, has defined “national origin discrimination” as including adverse employment action because of linguistic characteristics.²¹ Moreover, this section will give a brief analysis of the proof scheme that has developed in Title

where it relates to intimate privacy rights). For a greater discussion about the customer preference defense see *infra* Part IV.A.

¹⁶ Some cases where courts have found no discrimination on the basis of a foreign accent are: *Ang v. Proctor & Gamble Co.*, 932 F.2d 540 (6th Cir. 1991) (finding no accent discrimination where company fired Chinese-American after fourteen years of service); *Park v. Tutor-Saliba*, 2002 U.S. Dist. LEXIS 6943 (N.D. Cal. 2002) (holding against plaintiff of Korean decent who had worked in the construction field for more than seventeen years); *Forsythe v. Bd. of Educ.*, 956 F.Supp. 927 (D. Kan. 1997) (finding no accent discrimination where Cuban-born woman’s teaching contract was not renewed); see also *Nguyen*, *supra* note 14, at 1338 (noting that courts “regularly approve customer preference defenses” in accent cases). *But see, e.g., Carino v. U. of Okla.*, 750 F.2d 815 (10th Cir. 1984) (Filipino born plaintiff successfully showed that employer discriminated on basis of national origin and accent).

¹⁷ See, e.g., *Matsuda*, *supra* note 9, at 1347. Matsuda’s article is the seminal article in the field of accent discrimination and argues in part for the “dismantling [of] structures of subordination and promoting radical pluralism.” See also *supra* note 14.

¹⁸ See *supra* note 14 and accompanying text.

¹⁹ The general rule should be to exclude all customer preference arguments. Even in cases where accent-free speech is imperative—assuming there is such a thing as accent-free speech—such as a 911 operator, courts should rely on expert testimony, rather than allow the employer or co-worker to make a judgment on whose accent interferes with the job duties.

²⁰ Other commentators have also called for courts to reject customer preference arguments. See, e.g., *Matsuda*, *supra* note 9, at 1378 (stating that “[i]n order to avoid penalizing the employers who wish to practice equal opportunity it is necessary to reject customer preference arguments”).

²¹ 29 C.F.R. § 1606.1 (2004). For a more detailed definition of “national origin” see *infra* Part II.C.

VII cases and will discuss the seminal accent discrimination case of *Fragante v. City & County of Honolulu*.²²

Part III.A will give a brief review of linguistic research in the areas of second language acquisition and the special problem of retaining an accent when learning a foreign language later in life. The argument advanced here will include what other writers in the area have also recognized, namely that in many instances an accent is de facto an immutable trait, which, like race, should receive strong protection from discrimination.²³

Part III.B will look at recent demographic changes in the United States and the economic impact discrimination has on the individual and society as a whole. I will argue that, with the increased influx of immigrants into the United States, the law in the area of accent discrimination needs to ensure that qualified individuals for certain jobs are not discriminated against simply because customers or co-workers have a difficult time understanding them, because of their foreign accent.

Part IV.A will discuss the customer preference defense. As stated above, this Note will take the progressive position that because of the reasons outlined above—linguistic, demographic, and economic—the foreign accented speaker should be provided with greater protection from discrimination as is currently the case. Recent EEOC Guidelines have specifically addressed the issue of accent discrimination, which will be also discussed in Part IV.A. Despite these positive developments, a close look at the EEOC Guidelines regarding accent discrimination shows that they are still lacking in terms of adequately addressing foreign accent discrimination. Furthermore, Part IV.B will discuss recent research in the area of listener prejudice.²⁴

Part V will tie together the Note's argument. As alluded to above, the first step to achieve greater protection for the accented speaker (and hence a greater chance of plaintiff's success in prevailing in an accent discrimination cases) is for the trial courts to reject customer preference arguments from seeping into the record.²⁵ The focus at trial should be on objectively evaluating a person's

²² 888 F. 2d 591 (9th Cir. 1989), *cert. denied*, 494 U.S. 1081 (1990).

²³ See *infra* note 86 and accompanying text. Foreign accent has been previously characterized as a "speech defect." The recognition is that young persons may be more easily able to change to the speech pattern of a second language, while adults will have greater difficulty (sometimes never being able to shed the foreign accent completely) learning the new speech pattern. See, e.g., FRED M. CHREIST, FOREIGN ACCENT xvi-xvii (1964).

²⁴ For example, one recent study by Canadian researchers included an examination of cross-cultural awareness training that included linguistic instruction on attitudes toward and comprehension of foreign-accented speech. Tracey M. Derwing et al., *Teaching Native Speakers to Listen to Foreign-Accented Speech*, 23 J. MULTILINGUAL & MULTICULTURAL DEVELOP. 245, 245 (2002).

²⁵ There are of course other ways to achieve the goal of making it easier for foreign accent discrimination plaintiffs to win in court, and as a result of this greater chance of succeeding in

communication skills.²⁶ Moreover, by allowing employers to continue using the customer preference defense in everything from entry-level administrative jobs to professional positions, it discourages non-native speakers of English from fully participating in the workforce and has the implication of creating an underclass by the “underutilization of individual talents,” just because of that person’s foreign accent.²⁷ It seems ironic that, in a country of immigrants, tolerance for foreign accented speakers appears to be low and not a matter of great concern.²⁸ Part VI concludes this Note.

By focusing on the subject of foreign accent discrimination, I hope to, at best, get the reader to actively work to combat linguistic discrimination. At the least, I hope to introduce the reader to a developing area of the law and get him or her to think about some of the issues that I raise in this Note.

II. THE CONCEPTUAL FRAMEWORK OF TITLE VII DISCRIMINATION

A. *Title VII and National Origin Discrimination*

The Civil Rights Act of 1964 prohibits discrimination in employment on the basis of race, color, religion, national origin, or gender. Specifically Title VII of the act states the following:

- a) It shall be an unlawful employment practice for an employer—(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate

court bring about greater incentives for employers to change their attitudes toward discriminating against accented speakers. One of these ways would be to provide greater statutory protection for linguistic minorities (for a brief discussion about linguistic rights in the international context, *see infra* note 31). However, I will limit the scope of this Note to argue for the exclusion of the customer preference defenses, because I believe this is an area in which courts can adjust their practices right away (although this exclusion should be done statutorily, to bring about greater consistency). This will also allow me to develop the arguments for lowering the burden of proof for the plaintiffs in accent discrimination cases more fully, which should be seen as the main focus of the Note. Moreover, while this Note focuses on accent discrimination, I also advocate lowering the burden of proof for plaintiffs in other employment discrimination areas, such as race, sex, and other protected groups under U.S. employment discrimination laws. I believe making it easier for plaintiffs to prevail in court serves as the best deterrent to those who harbor discriminatory sentiments.

²⁶ *See supra* note 14 (listing other commentator’s suggestions to make evaluation of person’s communication skills more objective).

²⁷ THOMAS E. HARRIS, *APPLIED ORGANIZATIONAL COMMUNICATION* 129 (2002).

²⁸ *See* JOHN ANGLE, *LANGUAGE MAINTENANCE, LANGUAGE SHIFT AND OCCUPATIONAL ACHIEVEMENT IN THE UNITED STATES* 2 (1978) (arguing that part of the “apathy toward language problems” is due to the belief held by many Americans that immigrants should learn English “as rapidly as possible”).

against any individual with respect to his compensation, terms conditions, or privileges of employment, because of such individual's race, color, religion, sex, or *national origin*²⁹

National origin refers to the country of origin a person or his or her ancestors came from.³⁰ The act never mentions accent discrimination specifically.³¹

However, the EEOC, the agency given the responsibility of enforcing Title VII, has interpreted "national origin discrimination" to mean "the denial of equal employment opportunity because of an individual's, or his or her ancestor's, place of origin; or because an individual has the physical, cultural or *linguistic* characteristics of a national origin group."³² The EEOC has remarked that discrimination on the basis of how a person speaks or his or her accent might

²⁹ Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2 [§ 703] (2003) (emphasis added).

³⁰ 110 CONG. REC. 2549 (1964). The only definition given for "national origin" during the debate of Title VII was made by Representative Roosevelt, Chairman of the House Subcommittee which reported the bill, on the floor of the U.S. House. The Representative defined national origin as "the country from which you or your forebears came You may come from Poland, Czechoslovakia, England, France, or any other country." *Id.*

³¹ Given the recent publication of guidelines by the EEOC regarding foreign accent discrimination—see *infra* Part IV.A for a discussion about these new guidelines—and the fact that the Supreme Court at the time of this writing never has heard an accent discrimination case, the state of U.S. law vis-à-vis accent discrimination, as well as language rights in general, is still unsettled. The same can be said for international law dealing with language minorities. See SANDRA DEL VALLE, LANGUAGE RIGHTS AND THE LAW IN THE UNITED STATES 328 (2003). A brief look at the international perspective on this issue will assist in conveying the growing importance of dealing with linguistic discrimination in general. Language rights can be defined through two different approaches. One approach defines language rights as "the right to use one's own language in the course of one's personal human experience," while a second related approach "contemplates the protection of linguistic rights not only where language forms the basis of a distinct cultural group, but also in instances of individual assertion of linguistic rights." Joseph P. Gromacki, *The Protection of Language Rights in International Human Rights Law: A Proposed Draft Declaration of Linguistic Rights*, 32 VA J. INT'L L. 515, 516 (1992). That is, under this second approach both individual and group discrimination is protected, but it does not provide additional positive guarantees to use one's own language. *Id.* Regardless of how one defines the term "language rights," one of the major debates surrounding language rights is whether linguistic rights "merit protection in the context of international human rights" *Id.* at 517. The most significant international human rights document dealing with language rights is arguably the United Nations Charter. Article 1 states in part that "[t]o achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, *language*, or religion" U.N. CHARTER art. 1, para. 3, available at http://www.blm.gov/nhp/pubs/rewards/2000/ut_map.htm. (last visited March 16, 2005) (emphasis added).

³² 29 C.F.R. § 1606.1 (2004) (emphasis added).

constitute national origin discrimination³³ and that it will “closely investigate” charges involving denial of employment opportunities on the basis of a person’s foreign accent.³⁴

B. *The Structure of Litigation Under Title VII*

A plaintiff can use two theories to prove discrimination under Title VII. One is the “disparate treatment” theory and the other is the “disparate impact” theory. Either theory can be used to prove accent discrimination, but cases have tended to use the disparate treatment theory.³⁵

1. *The Structure of Disparate Treatment Cases*

There are two basic requirements to prove that disparate treatment has occurred. In order to prevail, the plaintiff has to prove that the protected category or trait (here national origin/accent) “actually motivated the employer’s decision.”³⁶ Moreover, disparate treatment can be proven by either circumstantial evidence (indirect evidence) or direct evidence. If there is no direct evidence, then the court will follow the proof scheme outlined in *McDonnell Douglas v.*

³³ 29 C.F.R. §§ 1606.6(b)–(b)(1) (2004).

³⁴ 29 C.F.R. § 1606.6(b) (2004); *see also* Allison Uehling, *Complaints About Communication Can Mask Accent Discrimination*, at http://www.greaterdiversity.com/career_resources/manage_others/accentsP.html (last visited March 16, 2005). This greater scrutiny by the EEOC is bemoaned by some commentators. For example, Walter Olson notes that:

the old principle of freedom of association in employment had a crucial advantage, namely that it gave employers discretion to balance the disadvantages of hiring the English-speaking novice for a particular job (customer frustration, the hazards of incomprehension) with the disadvantages of insisting on fluency (higher wage costs, passing up valuable skills).

Walter Olson, *Say What? Civil Rights Enforcers Go After “Accent Discrimination,”* at <http://reason.com/9711/col.olson.shtml> (last visited March 16, 2005). According to Olson this “advantage” was taken away by the EEOC and civil rights lawyers. He feels that “[n]ow the law tries to short-circuit the calculation. And woe betide the employer who hints to a lower-level worker that he might get ahead faster if he availed himself of that good old American tradition, the accent-reduction course.” *Id.* For a brief discussion about the use accent-reduction classes *see infra* notes 192–94 and accompanying text.

³⁵ For a list of cases using disparate treatment theory *see* Nguyen, *supra* note 14, at 1331 n.28. Nguyen notes that the disparate treatment theory is used more often in accent discrimination cases, since the focus is “on the plaintiff’s particular accent. Such a focus simplifies the litigation since the analysis of the claim is always specific to the individual and the facts surrounding her claim.” *Id.*

³⁶ *Reeves v. Sanderson Plumbing Prod. Inc.*, 530 U.S. 133, 140 (2000), *quoting* *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610 (1993).

Green.³⁷ In *McDonnell Douglas* the Court stated that the plaintiff has the initial burden of establishing a prima facie case of discrimination based on a prohibited category by showing (1) that the plaintiff belonged to a protected group; (2) that the plaintiff applied and was qualified for a job for which the employer was seeking applicants; (3) that, despite the plaintiff's qualifications the plaintiff was rejected for the position; and (4) that after the rejection the position remained open and the employer continued to seek applicants from persons of plaintiff's qualifications.³⁸

After the plaintiff has met the prima facie case and an inference of discrimination has therefore been raised, the "burden then must shift to the employer to articulate some legitimate, nondiscriminatory reason for the employee's rejection."³⁹ For example, in *Fragante*, Honolulu offered as its "legitimate, nondiscriminatory reason" that it hired a more qualified individual than Manuel Fragante.⁴⁰ Some commentators have noted that "virtually any reason [given by] the employer" that the employer claims he relied on is seen by most courts as "legitimate."⁴¹

Once the employer has articulated a reason for the decision, the plaintiff is given the opportunity to show that the reason given by the employer was pretext for the kind of discrimination prohibited by Title VII.⁴² That is, the plaintiff has to show that the defendant's proffered reason was "a smokescreen" for a prohibited discriminatory reason.⁴³ The complainant can show pretext in two ways: (1) by plaintiff's own affirmative evidence that the employer explicitly relied on the plaintiff's protected group category; or (2) by convincing the judge that the reason given by the defendant is implausible given the facts of the case.⁴⁴ However, the

³⁷ 411 U.S. 792 (1973).

³⁸ *Id.* at 802.

³⁹ *Id.* Interestingly, in *Fragante* the district court never applied the *McDonnell Douglas* proof scheme. See *Fragante v. City & County of Honolulu*, 699 F.Supp. 1429, 1429–32 (D. Haw. 1987). On appeal the Ninth Circuit did state that plaintiffs in disparate treatment cases "commonly prove a prima facie case by showing that the four factors set forth in *McDonnell Douglas* are present," but ultimately did not decide whether *Fragante* established a prima facie case or not. *Fragante*, 888 F.2d at 595. The Ninth Circuit reasoned that since the court held that "Fragante did not carry the ultimate burden of proving national origin discrimination," it simply assumed that he established a prima facie case. *Id.* at 595–96.

⁴⁰ *Fragante*, 888 F.2d at 598 (noting that the interviewers found that Fragante's communication skills were hampered by his pronounced accent "a legitimate factual basis . . . that Fragante would be less able than his competition to perform the required duties was established").

⁴¹ HAROLD S. LEWIS & ELIZABETH J. NORMAN, *EMPLOYMENT DISCRIMINATION LAW AND PRACTICE* 137 (2001).

⁴² *McDonnell Douglas*, 411 U.S. at 798–99.

⁴³ LEWIS & NORMAN, *supra* note 41, at 139–40.

⁴⁴ *Id.*

Supreme Court in *St. Mary's Honor Center v. Hicks*⁴⁵ held that even if the plaintiff satisfies the second way of demonstrating pretext, that is, the plaintiff has discredited all of the employer's reasons, the plaintiff does not necessarily win his or her case. The Court disagreed with the lower court's holding that "rejection of the employer's asserted reasons for its actions mandates a finding for the plaintiff."⁴⁶ According to the Court, this would stand in contrast to Rule 301 of the Federal Rules of Civil Procedure, "that a presumption does not shift the burden of proof," and the Court's "repeated admonition" that the plaintiff of a Title VII case "bears the 'ultimate burden of persuasion'" at all times.⁴⁷

However, the defendant does not have to rebut the plaintiff's prima facie case, but can invoke the bona fide occupational qualification (BFOQ) exception in disparate treatment cases.⁴⁸ That is the employer admits to discriminating, but argues that the discrimination is essential to the business and is a qualification that is necessary to the essence of the business.⁴⁹ The employer bears the initial burden of production and ultimate burden of persuasion when invoking the affirmative defense of BFOQ. Moreover, the defense allows only the narrowest of exceptions to the general rule requiring equal opportunity in employment.⁵⁰ Because of these narrow exceptions, the BFOQ defense has been nearly entirely eliminated as a defense in national origin cases.⁵¹

If there is direct evidence of discriminatory intent, such as discriminatory comments made by a decision-maker, the plaintiff needs to show that the employer made an employment decision on the basis of a prohibited reason. There are four basic requirements for there to be direct evidence: (1) a showing that the comments were made; (2) that the comments show discriminatory intent;

⁴⁵ *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502 (1993).

⁴⁶ *Id.* at 504.

⁴⁷ *Id.* at 511. However, in *Reeves* the Court held that a showing that the defendant's proffered reason was false "may permit the trier of fact to conclude that the employer unlawfully discriminated" *Reeves v. Sanderson Plumbing Prod. Inc.*, 530 U.S. 133, 148 (2000) (emphasis added).

⁴⁸ See, e.g., *Nguyen*, *supra* note 14, at 1332–33. Title VII says in relevant part:

Notwithstanding any other provision of this title, (1) it shall not be an unlawful employment practice for an employer to hire and employ employees . . . on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise

⁴² U.S.C. § 2000e-2(e).

⁴⁹ The test for the BFOQ defense was established in *Western Air Lines v. Criswell*, 472 U.S. 400 (1985).

⁵⁰ See, e.g., *Dothard v. Rawlinson*, 433 U.S. 321, 334 (1977).

⁵¹ GEORGE RUTHERGLEN, *EMPLOYMENT DISCRIMINATION LAW* 138 (2001).

(3) that the comments were tied to a particular decision; and (4) that the comments were made by the particular decision-maker.⁵²

*Price Waterhouse v. Hopkins*⁵³ addressed the issue of what happens when an adverse employment decision was based on a mixture of legitimate and illegitimate considerations, the so-called mixed motive cases. The Court held that, in mixed-motive cases, the defendant may avoid liability by proving by the preponderance of the evidence that it would have made the same decision even if it had not taken the prohibited factor into account.⁵⁴ However, Congress amended the Supreme Court's ruling in *Price Waterhouse*, allowing recovery of injunctive relief and attorney's fees upon the plaintiff's proof that a prohibited reason was a motivating factor. This is even true when the employer would have reached the same decision for legitimate reasons.⁵⁵

2. *The Structure of Disparate Impact Cases*

In *Griggs v. Duke Power Company*,⁵⁶ the Supreme Court held that intent is not needed for there to be discrimination under Title VII. The Court noted that Title VII was enacted to remove barriers that have in the past favored white applicants and employees over minority members of society. In light of this objective of Title VII, the Court opined that "practices, procedures, or tests" that are "neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory employment practices."⁵⁷ A three-pronged test is used to show whether a certain

⁵² *Price Waterhouse v. Hopkins*, 490 U.S. 228, 231 (1989). In *Poskocil* the plaintiff apparently attempted to argue that statements made by a supervisor at Northside High School that "'native speakers don't always make the best foreign language teachers'" was direct evidence of discrimination. *Poskocil v. Roanoke County Sch. Dist.*, No. 98-0216-R, 1999 U.S. Dist. LEXIS 259, *22 (W.D. Va. Jan. 11, 1999). The court, however, found that "on its face" it was "a neutral comment" and "[s]tanding alone, [the comment] does not demonstrate a sufficient inference of discriminatory motive to raise a triable issue of fact." *Id.* (emphasis added).

⁵³ 490 U.S. 228 (1989).

⁵⁴ *Id.* at 231-32.

⁵⁵ RUTHERGLEN, *supra* note 51, at 49.

⁵⁶ 401 U.S. 424 (1971).

⁵⁷ *Id.* at 430. Section 703 of the Civil Rights Act of 1964 was amended in 1991 to add the following subsections:

(k)(1)(A) An unlawful employment practice based on disparate impact is established under this title only if—

(i) a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity

practice of procedure has a disparate impact. First, the plaintiff has to establish a prima facie case by showing that a facially neutral practice has a significant adverse impact on the protected group. This can be done with statistical evidence.⁵⁸

Once the plaintiff has met the prima facie case, the employer then has to show that the instrument or practice at issue is job-related and is a business necessity. Whether an instrument or job practice is job and business related obviously becomes a very contested issue.⁵⁹ However, the circuit courts have attempted to nail down how to interpret this standard. Relying on the Supreme Court's analysis in *Griggs*, the Third Circuit in *Lanning v. Southeastern Pennsylvania Transportation Authority* held that a discriminatory cutoff score on an employment exam "must be shown to measure the minimum qualifications necessary to perform successfully the job in question."⁶⁰

Once the employer satisfies the job relatedness and business necessity defense, the plaintiff can rebut the defendant's defense by showing that there are "alternative business practices" that can be used that do not have a discriminatory effect.⁶¹ If plaintiff can show that there are alternative ways and the defendant refuses to adapt to the less discriminatory practices, then discrimination is established.⁶²

In the area of linguistic discrimination, disparate impact cases arise primarily in "Speak-English-only rules" (English-only) cases.⁶³ These English-only cases involve employers that require their employees to communicate only in English at

For additional discussion of this subsection see *infra* note 61.

⁵⁸ However, statistical proof that a protected group is adversely impacted by a certain practice or procedure is not enough. Rather, "a plaintiff must demonstrate that it is the application of a specific or particular employment practice that has created the disparate treatment under attack. Such a showing is an integral part of the plaintiff's prima facie case in a disparate-impact suit under Title VII." *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 657 (1989).

⁵⁹ It has been noted that "[t]he Supreme Court has yet to interpret the 'job related for the position in question and consistent with business necessity' standard adopted by the Act." *Lanning v. S.E. Pa. Transp. Auth.*, 181 F.3d 478, 488 (3d Cir. 1999).

⁶⁰ *Id.* at 493.

⁶¹ Section 2000e-2(k)(1)(A) of the Civil Right Act of 1964 as amended in 1991 states: "An unlawful employment practice based on disparate impact is established under this title only if—(ii) the complaining party makes the demonstration described in subparagraph (C) with respect to an alternative employment practice and the respondent refuses to adopt such alternative employment practices." 42 U.S.C. 2000e-2(k)(1)(A). For additional discussion of this subsection see *supra* note 57.

⁶² *Id.*

⁶³ See, e.g., *Garcia v. Spun Steak Co.*, 998 F.2d 1480, 1490 (9th Cir. 1993) (rejecting the EEOC's presumption "that an English-only policy has a disparate impact in the absence of proof").

their workplace.⁶⁴ While the EEOC has promulgated rules that presume English-only policies generally to be invalid if employees have to speak English at work,⁶⁵ a number of courts have held otherwise.⁶⁶ Moreover, while disparate impact cases will likely be rare in accent discrimination cases, they are not unheard of. In the case of *Garcia v. United States Postal Service*,⁶⁷ the complainant argued that a telephone application process had a disparate impact on individuals for whom English is a second language.⁶⁸ That is, the telephone's interactive voice recognition system did not register the information by non-native speakers of English, thus preventing those individuals from filing their application with the agency. The court in *Garcia* reversed the agency's decision to dismiss the case.⁶⁹

C. The EEOC and Accent Discrimination

In its Compliance Manual, the EEOC gives advice on how to avoid accent discrimination. The EEOC notes that under Title VII an employer may only make distinctions on the basis of a person's accent when the accent "materially interferes with the ability to perform job duties."⁷⁰ That is, employers have to ask themselves whether the accent makes it "substantially more difficult" for the

⁶⁴ See generally *id.* See also 29 C.F.R. § 1606.7 (2004).

⁶⁵ The EEOC divides English-only rules into two categories: (1) when the rule is applied "at all times" and (2) "when applied only at certain times." 29 C.F.R. §§ 1606.7(a)–(b) (2004). When English-only policies are applied at all times in the workplace, the EEOC presumes the policy to be in violation of Title VII "and will closely scrutinize it." 29 C.F.R. § 1606.7(a) (2004). When the English-only policy requires the employee only to speak English at certain times and the employer can show that the policy "is justified by business necessity, Title VII is not violated." 29 C.F.R. § 1606.7(b) (2004).

⁶⁶ See, e.g., *Garcia*, 998 F.2d at 1489–90 (upholding English-only policy at a California meat and poultry producer); *Prado v. L. Luria & Son*, 975 F.Supp. 1349 (S.D. Fla. 1997) (upholding a Florida department store's English-only policy that excluded breaks and lunchtime). For a good survey of English-only cases, see Kari Gibson, *English Only Court Cases Involving the U.S. Workplace: The Myths of Language Use and the Homogenization of Bilingual Workers' Identities*, 22 SECOND LANG. STUDIES, 1–60 (Spring 2004). See also Jeffrey D. Kirtner, Note, *English-Only Rules and the Role of Perspective in Title VII Claims*, 73 TEX. L. REV. 871 (1995) (arguing for adoption of minority class perspective during the prima facie stage of English-only cases, which in turn would make it more likely for plaintiffs in those cases to establish a prima facie case under the disparate impact theory).

⁶⁷ 2003 EEOPUB LEXIS 793 (Feb. 20, 2003).

⁶⁸ *Id.* at *1.

⁶⁹ *Id.* at *2.

⁷⁰ See, e.g., *EEOC Interpretive Manual: National Origin Discrimination*, EEOC COMPLIANCE MANUAL (BNA) No. 291, at 622:008 (Dec. 2002) [hereinafter *National Origin Interpretive Manual*] (discussing what recruiting practices an employer may not engage in with respect to individuals belonging to certain national origin groups).

individual to perform the job duties.⁷¹ The two questions the employer should ask himself or herself are (1) whether “the ability to communicate in fact materially relate[s] to the ability to perform the job” and (2) whether “the individual’s accent in fact interferes with that necessary ability to communicate?”⁷² If either question is answered in the negative and the employer has denied employment opportunities on the basis of the individual’s accent, then the employer has engaged in national origin discrimination.⁷³

The test set forth by the EEOC is arguably too broad and allows for too much discretion on the part of the employer. This becomes very apparent when one looks at the EEOC’s recent statements on customer preferences in the context of national origin and accent discrimination discussed below in Part IV.A. Moreover, the above analysis also raises questions about how to determine when an accent “interferes” with a person’s ability to communicate? Also, who should decide whether a person’s accent hinders the individual to perform the job? The employer? The applicant/employee? Co-workers? Customers? The most famous Title VII accent discrimination case to date illustrates some of these problems that courts have in dealing with this type of discrimination.

D. Another Example of Linguistic Discrimination? The Case of Fragante v. City & County of Honolulu

The most famous accent discrimination case to date took place in the Hawaiian Islands. In *Fragante v. City & County of Honolulu*, the plaintiff, Manuel Fragante, applied for a job with the Honolulu Division of Motor Vehicles (DMV). Fragante “placed high enough on a civil service” exam, to make him eligible to be chosen for the position.⁷⁴ However, Fragante was not selected for the position, because “of a perceived *deficiency* in relevant oral communication skills caused by his ‘heavy Filipino accent.’”⁷⁵

Manuel Fragante’s story is in many ways inspirational. In 1981, at the age of sixty, Fragante immigrated to the United States from the Philippines, his birth

⁷¹ *National Origin Discrimination*, EEOC TECHNICAL ASSISTANCE PROGRAM, A-6, (Feb. 1998). The EEOC further notes that one problem with accent discrimination is that it might be a “cover” for overt national origin discrimination. There is a danger that the employer will argue that it was not the person’s national origin that created the difficulties, but rather his or her deficient communication skills. *Id.*

⁷² *Id.*

⁷³ *Id.* Commentators on accent discrimination have argued that accent discrimination typically occurs not “because of unconscious bias, careless evaluation, false assumptions about speech and intelligibility, mistaken overvaluing of the role of speech on the job, or concessions to customer prejudice,” but rather because of a deliberate attempt by the employer to “eliminate certain ethnic group[s] from the workplace.” Matsuda, *supra* note 9, at 1338.

⁷⁴ *Fragante v. City & County of Honolulu*, 888 F.2d 591, 593 (9th Cir. 1988).

⁷⁵ *Id.* (emphasis added).

home. By all accounts Fragante was an intelligent and educated man. He had a law degree, spoke four languages, and was an officer in the Philippine military.⁷⁶ Throughout his military career he was invited to attend prestigious U.S. military schools, where he frequently performed better than his American counterparts. During his years of serving with the U.S. military, there were never any complaints about Fragante's accent. His English language ability was rated as "excellent" by his military superiors. Fragante's strong command of the English language can be attributed to the fact that all his schooling in the Philippines was in English.⁷⁷

Manuel Fragante's positive experiences with his American colleagues made him think about emigrating to the United States. In the early 1980s, his daughter was already living in Hawaii and in April 1981, he and his wife immigrated to the United States. He was subsequently naturalized as a U.S. citizen.⁷⁸

Not wanting to sit at home, Fragante applied for an advertised position at the DMV and as stated above was rejected for the position. At the oral interview, Fragante's two interviewers were not impressed with his oral communication skills. Both noted his "very pronounced accent" and felt that it would interfere with performing the functions of the job. As a result, they did not recommend Fragante for the position and another applicant was hired.⁷⁹ As in *Poskocil*, the court held in favor of the employer, noting that the DMV appeared to have acted on "reasonable business necessity," since Fragante "would be less able than his competition to perform the required duties" of the job.⁸⁰

What leads one to pause for a moment (or two!) when reading the case is that Fragante not only "placed high enough" on the civil service exam to qualify to be considered for the DMV position, but scored the highest score of the 721 test takers.⁸¹ Perhaps more importantly, Fragante did not apply for a supervisory or managerial position at the DMV, but for an entry-level clerk's job. The clerk position "involved such tasks as filing, processing mail, cashiering, orally providing routine information to the '*sometimes contentious*' public over the telephone and at an information counter, and obtaining supplies."⁸² Furthermore, a study of the position was conducted by the DMV. The study found that the key

⁷⁶ Fragante's military career spanned thirty years in the Philippine military. He retired from the military while holding the position of Army Adjutant. After his retirement he worked as a civilian in supervisory and administrative positions in Manila, Philippines. *Fragante*, 699 F. Supp. at 1429.

⁷⁷ Matsuda, *supra* note 9, at 1334.

⁷⁸ *Id.* at 1335; see also *Fragante*, 699 F. Supp. at 1429.

⁷⁹ *Fragante*, 888 F.2d at 597.

⁸⁰ *Id.* at 598.

⁸¹ *Id.* at 593. The exam in question is the written SR-8 Civil Service Examination, "which tested, among other things, word usage, grammar and spelling." *Id.*

⁸² *Id.* (emphasis added).

skills to perform the clerk's job satisfactorily included "alphabetizing, reproducing numbers and letters with accuracy, making change, exhibiting courtesy, and other routine clerical skills."⁸³ While communication skills appear to be important to the job, Fragante's strong English skills should have easily qualified him for the position.

At trial a linguist testified that Fragante speaks grammatically correct, standard English, with an accent that is characteristic of someone who was born and raised in the Philippines. The linguist concluded that a non-prejudiced speaker of English would have no trouble understanding Fragante.⁸⁴ Despite this, the defendant maintained that the plaintiff did not "speak clearly" and as stated above the district court and, more importantly, the Ninth Circuit sided with the defendant.⁸⁵ Based on the evidence in the case, the outcome of the case is highly questionable.

The argument for changes to the Title VII accent discrimination proof scheme is based on the fact that most non-native speakers of English are unable to eradicate their accent, even after residing for many years in the United States. In other words, the accent almost becomes an immutable trait for most foreign-born Americans.⁸⁶ Therefore, to fully appreciate and understand what Sophia Poskocil, Manuel Fragante, and other non native speakers face, it is necessary to understand what brings about an accent in a language that is not one's mother tongue. Moreover, the landscape of the American workforce is quickly changing. Currently, the United States is seeing the highest level of international

⁸³ Matsuda, *supra* note 9, at 1336.

⁸⁴ Interestingly, the linguist, who sat through Fragante's trial, noted that during the proceedings attorneys for both sides made mistakes in grammar and sentence structure, including the judge. When reviewing the transcript of the trial, the linguist further found that Fragante's English "was more nearly perfect in standard grammar and syntax than any other speaker in the courtroom." In addition, at no point in the trial did anyone state that they could not understand Fragante's speech. *Id.* at 1338.

⁸⁵ *Fragante*, 888 F.2d at 598–99. For an even more detailed account of Manuel Fragante's background and circumstances surrounding the trial, see Matsuda, *supra* note 9 and accompanying text.

⁸⁶ Linguist Rosina Lippi-Green notes that one needs to differentiate between two kinds of accents, namely a first language (L1) and second language (L2) accent. L1 accent is considered to be a variety of spoken U.S. English. Moreover, "every native speaker of US English has an L1 accent, no matter how unmarked the person's language may seem to be." ROSINA LIPPI-GREEN, *ENGLISH WITH AN ACCENT: LANGUAGE, IDEOLOGY, AND DISCRIMINATION IN THE UNITED STATES* 43 (1997). For a discussion of L2 accent, see *infra* Part III.A. Also, a number of commentators have pointed out that for some individuals the L2 accent becomes an immutable trait. See, e.g., DEL VALLE, *supra* note 31, at 144. Del Valle comments that "for the courts, the presence of a true, as opposed to slight or bare, accent is sufficient to disqualify the applicant from work involving 'communicative skills.' This attitude is especially offensive, since accent is . . . [a] kind of *immutable* characteristic" But see Overstreet & Yule, *supra* note 10 (suggesting that there is no linguistic support for the argument that accent is immutable).

immigration since 1900.⁸⁷ With this increased influx of immigrants into the United States, the laws in the area of accent discrimination need to ensure that qualified non-native speakers of English are not discriminated against simply because employers, co-workers, and customers do not want to listen to accented speech. It is vitally important that immigrants are given the opportunity to reach their fullest potential, not only for the immigrants themselves, but more importantly for the U.S. economy as a whole.⁸⁸

III. ACCENTS, IMMIGRANTS, AND ECONOMICS: THE CASE FOR LOWERING THE BURDEN OF PROOF IN TITLE VII ACCENT DISCRIMINATION CASES

A. Language Acquisition and Accent

A number of linguists have looked into how accents develop.⁸⁹ To better understand what one means by "accent," it is necessary to discuss what one means by speech and language in general. The focus of this Note and accent discrimination revolves around speech, that is, spoken language.⁹⁰ As babies, humans are already equipped with a neurophysical system that will enable them to learn a language as they grow. During normal development, the vocal tract of a person will develop and, at six months, children "babble in meaningless vocal play."⁹¹ The ease with which children acquire⁹² a language cannot be repeated in

⁸⁷ Eileen Diaz McConnell & Felicia B. Leclere, *Selection, Context, or Both? The English Fluency of Mexican Immigrants in the American Midwest and Southwest*, 21 POPULATION RES. & POL'Y REV. 179, 179 (2002). Immigrants from Mexico comprise a plurality of the total of legal and illegal immigrants coming to the United States. While Mexican immigrants still primarily settle in the southwestern states, more of them are also residing in large numbers in the Midwest. *Id.* See also Abraham T. Mosisa, *The Role of Foreign Born Workers in the U.S. Economy*, MONTHLY LAB. REV., May 2002, at 3 (stating that nearly half of the net increase in the U.S. labor force between 1996 and 2000 was made up of foreign-born workers).

⁸⁸ See, e.g., Mosisa, *supra* note 87 and accompanying text.

⁸⁹ See, e.g., CHREIST, *supra* note 23; DEBORAH M. REKART, EVALUATION OF FOREIGN ACCENT USING SYNTHETIC SPEECH (1985).

⁹⁰ One should point out that at times non-native speakers will have a stronger command of the second language in terms of grammar and spelling than native speakers. See, e.g., *Fragante*, 888 F.2d at 593 (noting that *Fragante* received the highest score on the civil service exam "which tested among other things, word usage, grammar, and spelling."); *Berke, v. Ohio Dep't of Pub. Welfare*, No. C-2-75-815, 1978 U.S. Dist. LEXIS 17380, at *14 (noting that plaintiff, a native of Poland, had a "command of the [English] language [that] is well above that of the average adult American"); GEOFFREY CARLINER, THE WAGES AND LANGUAGE SKILLS OF U.S. IMMIGRANTS 9 (Nat'l Bureau of Econ. Research, Working Paper No. 5763, 1996) (stating that "most working immigrants have strong English skills"); GEORGE YULE, THE STUDY OF LANGUAGE 191 (2d ed. 1996) (discussing author Joseph Conrad's strong Polish accent when speaking English, but also recognizing his "great expertise in writing" English).

⁹¹ GLORIA J. BORDEN ET AL., SPEECH SCIENCE PRIMER 5 (4th ed. 2003).

adulthood, with the most conducive time for learning languages being before puberty.⁹³ Furthermore, most children are exposed to only one language, with exposure to a second or more languages occurring later on in life, if at all.⁹⁴ While there is some disagreement among speech scientists, linguists, and psychologists as to how language is acquired, the most widely accepted view is that "details or individual items of a particular language are learned, whereas the rule-building abilities that underlie the structural and semantic analyses of language, and thus the ability to create novel utterances, are innate."⁹⁵

Speech "is a continuously changing stream of sound."⁹⁶ The goal of speech is to make meaningful sound combinations.⁹⁷ Furthermore, speech has a structure

⁹² When linguists speak of "acquiring" language, they refer "to the gradual development of ability in a language by using it naturally in communicative situations." In the context of language, "learning" a language "applies to a conscious process of accumulating knowledge of the vocabulary and grammar of a language. YULE, *supra* note 90, at 191.

⁹³ BORDEN, *supra* note 91, at 5. However, Canadian neurophysiologist Wilder Penfield believes that the cutoff age is at about fifteen, shortly after puberty in most cases. *Id.* See also YULE, *supra* note 90, at 191 (stating that "after the Critical Period has passed (around puberty) it becomes very difficult to acquire another language fully"). Moreover, linguist Fred Chreist notes that "[a]s the child matures, his language becomes more intimately a part of his life, his work and his recreation. Such deeply established habits become obstructions to new speech patterns demanded by second-language learning." CHREIST, *supra* note 23, at xvi.

⁹⁴ See YULE, *supra* note 90, at 190.

⁹⁵ BORDEN, *supra* note 91, at 5. According to Gloria Borden, theorists studying this matter can be divided into two groups. The first group analyzes language development in terms of learning principles and the second group looks at the development of language in terms of an innate propensity for language. The learning theorist O.H. Mowrer has suggested that a child will associate the utterance of the word "mama" with the comforting presence of the mother accompanied by food. As a result "mama" becomes a learned response. Even if the word is not said aloud all the time when interacting with the child, Mowrer posits that the word is being rehearsed by the child. Mowrer has labeled this the "autistic theory." *Id.* at 6. The subvocally rehearsing of the new word or words coincides with setting up "internal rewards sufficient for the words to become learned or conditioned behavior." *Id.* This theory explains why children suddenly will use words they have never spoken before. Innateness theorists counter that the learning theorists cannot explain a number of factors in the development of language. For example, children have been found to both understand and produce sentences they have never heard before and therefore could not have learned. As a result "[m]any psycholinguists think that this ability to abstract the rules of the language is innate; some think that aspects of linguistic structure are innate." *Id.*

⁹⁶ *Id.* at 23. For a detailed analysis of acoustics and sound, see *id.* at 23–40.

⁹⁷ BORDEN, *supra* note 91, at 41. In order to produce different sounds, a person regulates the airstream as the air passes from the lungs to the atmosphere. Linguists have noted that

[t]his regulation is brought about by movements of jaw, lips, tongue, soft palate, walls of the pharynx, and vocal folds to alter the shape of the vocal tract. The movements

and form that evolves as language.⁹⁸ Language binds a community together and is the product of social factors in a given culture.⁹⁹ Having grown up in one culture, an individual who finds herself in a different culture will be confronted with new speech patterns, sounds, and noises.¹⁰⁰

While children acquire their native language during the parental “bombardment” period of the early stages of development and can learn a second language more easily when they are young, adults have a more difficult time.¹⁰¹ Moreover, if the child is introduced to a second language early in life, he or she will have an easier time learning the second language, because the child’s habits of his or her native language have not become set.¹⁰² Adults have a more

are mainly the result of muscle contractions, which are caused by nerve impulses and of course the whole process is controlled in the nervous system.

Id.

⁹⁸ CHREIST, *supra* note 23, at xxviii. Linguists have defined language in a couple of ways. For some authorities, language is “a system of arbitrary vocal symbols by means of which human beings communicate and cooperate with one another.” *Id.* Others view language as a type “of symbolization which includes not only the vocal symbols which are a part of a speech communication system but the visible movements used by a speaker or the written words contained in a letter, magazine, or book.” *Id.*

⁹⁹ ANGLE, *supra* note 28, at 5; CHREIST, *supra* note 23, at xxviii.

¹⁰⁰ See CHREIST, *supra* note 23, at xxviii.

¹⁰¹ *Id.* at 18. See also *supra* note 23 and accompanying text. Fred Chreist describes how the monolingual (person speaking one language) acquires his native languages as follows:

When the monolingual learns his native language, he is faced with the problem of comparing every phoneme learned with every other in order to acquire the significance of “distinctive” difference between these sounds when forming meaningful units. Long before he reaches school age he learns by generalization and discrimination which sounds belong in certain positions within various speech patterns. The second-language learner must match each new phoneme with every other phoneme in his native language, as well as with every other phoneme in the new language, before he can be confident that he has the phoneme system of his second language under control.

Id. at 17–18. See also YULE, *supra* note 90, at 191 (stating that “very few adults seem to reach native-like proficiency in using a second language”). Moreover, a recent study of Korean immigrants showed that the older the person was when he or she arrived in the United States, the stronger their accent tended to be. James Emil Flege et al., *Age Constraints on Second Language Acquisition*, 41 J. MEM. LANG. 78, 85 (1999).

¹⁰² CHREIST, *supra* note 23, at 18. Furthermore, linguist George Yule notes that

even during the ‘optimum age’, there may exist an acquisition barrier of quite a different sort. Teenagers are typically much more self-conscious than young children. If there is a strong element of unwillingness or embarrassment in attempting to produce the ‘different’ sounds of other languages, then it may override whatever physical and cognitive abilities there are.

YULE, *supra* note 90, at 192.

difficult time acquiring the second language and speaking it accent-free¹⁰³ because the adult will “*relate to his native sound system all the sounds he hears*.”¹⁰⁴ The adult has to be taught methods for discriminating among the new different sounds and has difficulty doing this successfully because of his or her native-language listening habits.¹⁰⁵ As alluded to above, through his parents, the second-language learner (L2) has absorbed the changing intonation patterns of his own native language. When the L2 tries to speak the foreign language, “these deeply ingrained habits of pitch change intrude [into the new language]. His native melody ‘shows through’ and we [linguists] say he has a *foreign accent*.”¹⁰⁶ This variation in pronunciation, rather than word choice, is what is going to be referred to as “accent” in this Note.¹⁰⁷

B. The Increased Influx of Non-Native Speakers of English to the United States and Their Role in the Workplace

The United Nations recently estimated that over 60 million people, about 1.2% of the labor force, reside in a country other than the one in which they were born.¹⁰⁸ The most popular destinations are the United States, Canada, and Australia.¹⁰⁹ While most immigrants during the “First Great Migration”¹¹⁰ hailed

¹⁰³ Everyone has an accent, hence it may not be proper to speak of “accent-free” language. When employer’s refuse to hire a person because of his or her “accent”, the employer is “referring to a hidden norm of non-accent—a linguistic impossibility, but a socially constructed reality.” Matsuda, *supra* note 9, at 1361.

¹⁰⁴ CHREIST, *supra* note 23, at 18.

¹⁰⁵ CHREIST, *supra* note 23, at 18. See also YULE, *supra* note 90, at 190–91 (noting that most people tend to learn a second language “in a few hours each week of school time . . . with a lot of other occupations . . . and with an already known language for most for their daily communicative requirements”).

¹⁰⁶ *Id.* at 44 (emphasis added). For a more detailed discussion of linguistic melody and intonation see CHREIST, *supra* note 23, at 43–56 (discussing intonation) and BORDEN, *supra* note 91, at 73 (same).

¹⁰⁷ This is similar to Mari Matsuda’s approach in her article on accent discrimination. See Matsuda, *supra* note 9.

¹⁰⁸ George J. Borjas, *The Economics of Immigration*, 32 J. ECON. LITERATURE 1667, 1667 (1994).

¹⁰⁹ *Id.* Other countries have also experienced a large influx of immigrants in recent years. France’s population, for example is made up of almost 11% of immigrants, Switzerland’s population is 17% immigrant, and about 9% of United Kingdom residents are foreign-born. *Id.*

¹¹⁰ The “First Great Migration” roughly spans from the early 1880s to about 1924. During those years, about 25.8 million people entered the United States. *Id.* at 1668. See also Mosisa, *supra* note 87, at 3–4.

from the United Kingdom and Germany, today's immigrants come primarily from Latin America and Asia.¹¹¹

Most immigrants come to the United States because they are searching for better job opportunities and the possibility of getting higher wages than in their country of origin.¹¹² They tend to be younger¹¹³ and less educated¹¹⁴ than native-born individuals. Moreover, most immigrants will earn lower wages than the average person in the United States.¹¹⁵

However, some immigrants, such as Sophia Poskocil and Manuel Fragante, come to the United States highly skilled and with advanced education. Often times skilled immigrants find themselves underemployed because of their "lack" of English skills, or as this Note is arguing, perceived lack of English skills due to their foreign accent.¹¹⁶ Besides Poskocil and Fragante, other stories of accent

¹¹¹ Mosisa, *supra* note 87, at 3-4; see also McConnell & Leclere, *supra* note 87 and accompanying text. In the decade between 1981 and 1990, most immigrant flow can be categorized as follows: 49.3% of the immigrants came from the Americas (primarily Mexico), 37.3% came from Asia (primarily from the Philippines, China, and Korea), 10.4% came from Europe (mainly from the United Kingdom), 2.4% came from Africa, and 0.6% from Oceania. Borjas, *supra* note 108, at 1670. The two states with the largest immigrant population are California and New York. More than one in three Californians are immigrants and every fourth New Yorker is an immigrant. Jeff Chapman & Jared Bernstein, *Immigration and Poverty: How are they Linked?*, MONTHLY LAB. REV., Apr. 2003, at 10.

¹¹² Mitra Toossi, *A Century of Change: The U.S. Labor Force, 1950-2050*, MONTHLY LAB. REV., May 2002, at 20.

¹¹³ *Id.* Economist Mitra Toossi points out that immigrants have higher fertility rates than native-born Americans, leading to an even greater diversity of the U.S. population and labor force. *Id.*

¹¹⁴ CARLINER, *supra* note 90, at 3 ("On average, immigrants have slightly less schooling than native workers."); Borjas, *supra* note 108, at 1676 (asserting that immigrants in the United States are "relatively unskilled (at least in terms of educational attainment)"); Mosisa, *supra* note 87, at 4.

¹¹⁵ This gap is most pronounced shortly after immigrants arrive. However, as immigrants gain greater knowledge about the U.S. labor market practices and their English skills improve the gap narrows. CARLINER, *supra* note 90, at 3. The income gap between native-born and foreign-born workers is evident across all levels of educational attainment. The following is a list of median weekly earnings for the year 2000. Dollar amounts for foreign-born workers are in parenthesis: Less than a high school diploma: \$389 (\$322). High school graduates, no college: \$514 (\$420). Some college, no degree: \$604 (\$524). College graduate: \$902 (\$852). This data shows that the median weekly earnings disparity between native-born and foreign-born workers is largest among the high school graduates (about 17% less for foreign-born workers) and smallest for college graduates (about 6% less for foreign born workers). Mosisa, *supra* note, 85 at 10.

¹¹⁶ As Mari Matsuda points out in her discussion about Manuel Fragante, "no one ever complained about [Mr. Fragante's] accent," until his interview with the Honolulu DMV. Matsuda, *supra* note 9, at 1368. See also Thomas J. Coates & Patricia M. Regdon, *Thrice: A Technique for Improving the American English Language Delivery of Non-Native Speakers*,

discrimination underline this unfortunate development of underemployment of L2 English speakers even more.

Zhen-yi Cheng obtained a bachelor's degree in physics and a master's degree in electrical engineering in Asia. He studied English for years and was able to express himself well, but spoke with an accent. Cheng believed that he would be able to pursue his career in the United States, but his accented speech relegated him to a clerical position.¹¹⁷

Sulochana Mandhare earned two bachelor's degrees in her native India, one of which was in education. After she immigrated to the United States, she obtained a Master's of Education degree from Loyola University in New Orleans and received certification as a school librarian. Mandhare was employed as a librarian at an elementary school serving children from kindergarten through second grade. After one year of employment the school district decided not to renew her contract, stating that Mandhare had "a communication problem because of her heavy accent . . . which prevented her from effectively communicating with primary school students."¹¹⁸ The district court found that the school district discriminated against Mandhare and held in her favor, stating that she was "eminently qualified" to be a librarian.¹¹⁹ However, the appeals court reversed without an opinion, leaving Mandhare in a state of "untold emotional anguish [and] financial difficulty."¹²⁰

Accented professionals do not fare much better in the United States. In *Hou v. Pennsylvania Department of Education*, the plaintiff was originally from China and had his Ph.D. in mathematics.¹²¹ Dr. Hou was refused promotion on the basis that his accent hindered his teaching effectiveness. The court noted that "[t]he issue of accent in a foreign-born person of another race is a concededly delicate subject when it becomes part of peer or student evaluations, *since many people are prejudiced against those with accents*."¹²² Nevertheless, the court, reluctant to

TESOL Q., 363–64 (1974) ("[Educated immigrants in general] read, write, and express ideas in English relatively well.").

¹¹⁷ See Coates & Regdon, *supra* note 116, at 363–64.

¹¹⁸ *Mandhare v. W.S. LaFargue Elem. Sch.*, 605 F. Supp. 238, 239–40 (E.D. La. 1985) *rev'd without op.*, 788 F.2d 1563 (5th Cir.).

¹¹⁹ *Id.* at 241.

¹²⁰ LIPPI-GREEN, *supra* note 86, at 165. Despite "[t]he failure of the American judicial system," Mandhare ultimately was able to find employment again as a librarian. *Id.*

¹²¹ 573 F. Supp. 1539, 1540 (E.D. Pa. 1983).

¹²² *Id.* at 1547 (emphasis added). See also *infra* Part IV.A (discussing the customer preference defense in greater detail).

reverse the subjective judgments of university administrators, held for the defendant.¹²³

The examples above are just a few cases that some linguists have called a "tragedy," because the skills and abilities of these immigrants "lie wasted" and "[t]heir ability to contribute from the wealth of their heritages to the benefit of ours is constricted."¹²⁴

The plaintiffs in the cases above have had to deal with the financial impact that discrimination has on them and their families. Perhaps more importantly, foreign accent discrimination has a serious economic impact for society as a whole. Economists view discrimination in general as being inefficient and a waste of resources.¹²⁵ This inefficiency and wastefulness can be attributed to the fact that discrimination leads to a "deviation of the optimal wage- and price-structures."¹²⁶ Moreover, various forms of discrimination in the workplace, such as race,¹²⁷ age,¹²⁸ and sex discrimination,¹²⁹ have been shown to have a negative economic impact. In addition, a recent task force study on immigrants, most of

¹²³ *Id.* at 1548. Marceliano Marcias, a native of Columbia, was trained as a doctor before he came to the U.S. Rather than finding a job in his chosen profession, he had to take on "odd jobs that included cleaning supermarket floors to support his five children." A recently instituted program at Florida International University designed specifically for foreign-trained doctors, allowed Marcias to at least be retrained as a nurse. *Florida Program Turns Doctors Into Nurses*, USA TODAY, Dec. 17, 2003, at 10D.

¹²⁴ Coates & Regdon, *supra* note 116, at 364.

¹²⁵ Theres Egger et al., *Möglichkeiten von Massnahmen Gegen Rassistische Diskriminierung in der Arbeitswelt*, BÜRO FÜR ARBEITS- UND SOZIALPOLITISCHE STUDIEN March 2003, at 35 (noting that the discrimination of individual groups of employees is economically inefficient, because it wastes resources) (author's translation).

¹²⁶ *Id.* (Moreover, "if the optimal price structure is not realized the aggregate output of an economy stays below its highest possible level.") (author's translation).

¹²⁷ See, e.g., *Katzenback v. McClung*, 379 U.S. 294, 299-300 (1964) (noting that race discrimination causes "'an artificial restriction on the market'") (citing 110 Cong. Rec. 7402-7403); Anthony H. Pascal & Leonard A. Rapping, *The Economics of Racial Discrimination in Organized Baseball*, in *RACIAL DISCRIMINATION IN ECONOMIC LIFE* 119, 119 (Anthony H. Pascal ed., 1972) (stating that "[d]isadvantage is caused both by inadequate work preparation and by bias in hiring and promotion, and further, a man's opportunities are importantly affected by the color of his skin") (emphasis added); Roger L. Ransom & Richard Sutch, *The Ex-Slave in the Post-Bellum South: A Study of the Economic Impact of Racism in a Market Environment*, 33 J. ECON. HIST. 131, 134 (1973) ("racism can have a profound and lasting effect even in the face of competitive market pressures").

¹²⁸ See, e.g., *EEOC v. Wyoming*, 460 U.S. 226, 231 (1983) (stating that past acts of age discrimination "deprived the national economy of the productive labor of millions of individuals and imposed on the governmental treasury substantially increased costs in unemployment insurance and federal Social Security benefits").

¹²⁹ See, e.g., L. Camille Hébert, *The Economic Implications of Sexual Harassment for Women*, 3 KAN. J.L. & PUB. POL'Y 41, 44-47 (1994) (discussing the economic impact of sexual harassment).

whom are not native speakers of English,¹³⁰ advocated “that immigration be treated as a critical element of economic policymaking and national productivity.”¹³¹

Despite the negative economic impact discrimination has on the economy and despite the “wealth of their heritages”¹³² that foreign-born workers bring with them, employers, as demonstrated above, still discriminate against accented individuals in the U.S. labor market. Why this discrimination still persists is important to understand, especially in terms of why accented speech is not vigorously protected by the law. Part of the reason appears to be ideological. In the 1920s, the “Americanization campaigns” encouraged recently arrived immigrants to learn English as quickly as possible, often underestimating the difficulty with which English is learned.¹³³ Moreover, this ideology does not perceive there to be a permanent language barrier, but rather just a “regrettable slowness” of immigrants to learn English “and us[e] [English] all the time.”¹³⁴ It is this long held belief system by native-born speakers of English that undoubtedly leads them to prefer native speech to accented speech. With the influx of ever more non-native speakers of English into the United States and the economic impact continued discrimination will have on the individual and the country as a whole, this belief system needs to be altered if the United States (or any other country whose people harbor similar prejudices!) wants to continue to grow economically and not develop an underclass that will burden society as a whole.¹³⁵

¹³⁰ See, e.g., Borjas, *supra* note 108, at 1670 (listing regions of origin of immigrants coming to the United States in 1981–1990 period and earlier decades, and showing that the vast majority of immigrants come from countries where English is generally not the first language).

¹³¹ CHICAGO COUNCIL ON FOREIGN RELATIONS, KEEPING THE PROMISE: IMMIGRATION PROPOSALS FROM THE HEARTLAND 4 (Jim Edgar et al. co-chairs, 2004).

¹³² See Coates & Regdon, *supra* note 116 and accompanying text.

¹³³ ANGLE, *supra* note 28, at 2. As a result of this ideology, legislators and social researchers ignored the problem of accent discrimination. *Id.*

¹³⁴ *Id.* at 3.

¹³⁵ See *infra* notes 202–04 and accompanying text (discussing “cross-cultural” training for native speakers as one way to decrease biases among native speakers vis-à-vis foreign accented speakers).

IV. THE CONTINUED PROBLEM WITH THE CUSTOMER PREFERENCE DEFENSE IN TITLE VII ACCENT DISCRIMINATION CASES

A. Customer Preference and BFOQ under Title VII

While the EEOC believes that the preferences of customers, clients, or co-workers generally do not warrant a BFOQ exception,¹³⁶ customer preference arguments have and continue to be raised in a number of employment cases. For example, in *Diaz v. Pan American Airways*,¹³⁷ the airline had a policy discriminating against male applicants for the position of flight attendant. Pan Am argued in part that its passengers strongly preferred to be served by female flight attendants and that the airplane cabin is a unique environment, creating special psychological needs on the part of the passengers. These psychological needs, the carrier argued, were better provided for through female flight attendants.¹³⁸ The Fifth Circuit rejected the airline's arguments and held that Pan Am's policy to hire only female flight attendants was not a BFOQ and was not "reasonably necessary to the normal operation" of Pan Am's business.¹³⁹ Moreover, the court went on to say that "we feel that customer preference may be taken into account only when it is based on the company's inability to perform the primary function or service it offers."¹⁴⁰

One area where customer preferences have been considered to be more persuasive is in the context of privacy-based sex discrimination. Discrimination in this area has been allowed where the position requires actual physical touching or the inspection of another person's naked body.¹⁴¹ This is especially true for jobs

¹³⁶ For example, in regards to the BFOQ for sex, the EEOC notes:

the following fact situation is among those which do *not* warrant application of the BFOQ exception: the refusal to hire an individual because of the preferences of co-workers, the employer, clients, or customers except where a BFOQ based on sex is necessary for purpose of authenticity or genuineness: e.g., in hiring an actor or actress.

EEOC Interpretive Manual: Bona Fide Occupational Qualifications, EEOC COMPLIANCE MANUAL (BNA) No. 291, at 625:0004 (Dec. 2002). For a brief discussion about the BFOQ defense, see *supra* notes 48–51 and accompanying text.

¹³⁷ 442 F.2d 385 (5th Cir. 1971).

¹³⁸ The airline argued that "providing reassurance to anxious passengers" was part of these "psychological needs." *Id.* at 387 (quoting trial court). Apparently "[m]any airlines" at the time claimed that females were better equipped to reassure anxious customers about flying. *Developments in the Law: Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 HARV. LAW REV. 1109, 1182 (1971).

¹³⁹ *Diaz*, 442 F.2d at 386 (quoting section 703(e), now 2002e-2(e), of Title VII of the Civil Rights Act of 1964).

¹⁴⁰ *Id.* at 389.

¹⁴¹ Kimberly A. Yuracko, *Private Nurses and Playboy Bunnies: Explaining Permissible Sex Discrimination*, 92 CALIF. L. REV. 147, 156 (2004).

that fall into what are considered to be caregiver or security positions, such as nurses¹⁴² and prison wardens.¹⁴³ However, some courts have rejected sex discrimination even in these settings.¹⁴⁴

In the context of national origin discrimination, the EEOC explicitly states that employers may not rely on customer preferences when making employment decisions.¹⁴⁵ The EEOC goes on to give an example of when an employer's customer preference consideration on the basis of national origin would constitute a violation of Title VII:

Alexi, a Serbian-American college student, applies to work as a cashier at a suburban Discount store. Although Alexi speaks fluent English, the manager who conducts the routine interview comments about his name and noticeable accent, observing that XYZ's customers prize its "all-American image." Alexi is not hired. XYZ has subjected Alexi to unlawful national origin discrimination if it based the hiring decision on assumptions that customers would have negative perceptions about Alexi's ethnicity.¹⁴⁶

The example of national origin discrimination already includes a reference to a person's foreign accent, re-enforcing the idea that a person's foreign accent is intertwined with one's national origin.

The EEOC recently updated its guidance to employers in the area of national origin discrimination, including accent discrimination.¹⁴⁷ This change was precipitated by the increasing number of accent discrimination cases in recent years and the continued influx of non-native English speakers.¹⁴⁸ As already

¹⁴² See, e.g., *EEOC v. Mercy Health Ctr.*, No. Civ. 80-1374-W, 1982 WL 3108 (W.D. Okla. Feb. 2, 1982) (holding sex to be a BFOQ for nursing positions in a hospital's labor and delivery rooms).

¹⁴³ See, e.g., *Robino v. Iranon*, 145 F.3d 1109, 1111 (9th Cir. 1998) (holding that sex was a BFOQ for "First Watch" guards at a women's prison, which entailed observing the inmates naked in the shower and toilet areas). For a list of other prison privacy-based BFOQ cases, see Yuracko, *supra* note 141, at 156 n.21.

¹⁴⁴ See, e.g., *Olsen v. Marriott Int'l*, 75 F.Supp. 2d 1052 (1999) (rejecting the customer preference arguments for the position of massage therapist and holding hotel chain liable for sex discrimination).

¹⁴⁵ National Origin Interpretive Manual, *supra* note 70, at 622:0004.

¹⁴⁶ *Id.* at 622:0004-0005.

¹⁴⁷ Press Release, Equal Employment Opportunity Commission, EEOC Updates Guidance on National Origin Bias (Dec. 2, 2002), available at <http://www.eeoc.gov/press/12-2-02.html>.

¹⁴⁸ See Citing "Disturbing" Trends in Discrimination, Chair Says EEOC is Probing Retail Industry, 23 EMP. DISC. REP. 112, 112 (Aug. 4, 2004) (noting an increase in accent discrimination cases); see also National Origin Interpretive Manual, *supra* note 70, at 622:0008 (stating that the U.S. labor force has grown more diverse, with about 10.3 million people speaking little or no English).

illustrated in the discussions about *Poskocil*¹⁴⁹ and *Fragante*,¹⁵⁰ customer or co-worker's preference arguments routinely enter into the opinion of the courts in these contexts. For example, in *Ang v. Proctor & Gamble*,¹⁵¹ the Sixth Circuit rejected a Chinese-American plaintiff's claim of accent discrimination,¹⁵² despite evidence that Proctor & Gamble (P&G) appeared to have had at least a disparaging attitude toward non-native speakers of English. P&G's "Company Norms" brochure at the time stated "that the inability to speak the 'King's English' may be viewed by those in the majority culture as equating to intelligence (i.e. lack of),"¹⁵³ suggesting that accented speakers better get rid off their accent in order to be seen as smart and arguably therefore worthy of advancement. In addition, Ang, who had worked for P&G for fourteen years when he was terminated,¹⁵⁴ was continuously admonished in his evaluations by his superiors about his "continuous . . . need for improved communication skills."¹⁵⁵ Nevertheless, Ang was also found to have had "extraordinary technical talent" despite his allegedly poor communication skills.¹⁵⁶ After a weak analysis of Ang's accent discrimination claim, the Sixth Circuit concluded that Ang did not present sufficient evidence to make out a *prima facie* case of accent discrimination.¹⁵⁷

Another case, *Yu v. United States Postal Service*,¹⁵⁸ nicely illustrates how preferences and biases by customers and co-workers is used by the employer as a partial defense to the charges of accent discrimination. Susan L. Yu, a part-time distribution clerk of Taiwanese origin, asked to be put on light-duty after a shoulder injury. The Postal Service argued that there was no suitable work for Yu and denied her request to answer the phones. The reason for this decision was given by Yu's supervisor, who justified the agency's action by stating that "[h]er

¹⁴⁹ For a detailed discussion about the *Poskocil* case see *supra* notes 2-8 and accompanying text.

¹⁵⁰ For a detailed discussion about the *Fragante* case see Part II.D. In another case, similar to *Fragante* in that it involved interviewers commenting on interviewee's accent, the court came to a similar conclusion and rejected complainant's claim. *Mostafa v. Dept. of Transp.* 2003 EEOPUB 5984 at (Oct. 9, 2003) (court noting that comments made by interviewers that complainant "does not speak well [and] does not have command of [English] language" were insufficient to show accent discrimination).

¹⁵¹ 932 F.2d 540 (6th Cir. 1991).

¹⁵² *Id.* at 541. The district court dismissed all of Ang's charges, which also included race discrimination and retaliatory discharge, among others. *Id.*

¹⁵³ *Id.* at 549. See also *infra* Part III.B (discussing listener prejudice).

¹⁵⁴ *Ang*, 932 F.2d at 541. Also, Ignatius Ang is a Ph.D and a U.S. citizen. He primarily worked in P&G's Management Systems Division as a systems analyst. *Id.*

¹⁵⁵ *Id.* at 542.

¹⁵⁶ *Id.* at 543.

¹⁵⁷ *Id.* at 549-50.

¹⁵⁸ 1997 EEOPUB LEXIS 3884 (Oct. 10, 1997).

[Yu's] English is not easily understood, which is absolutely necessary for the performance of this job [answering the phones]." ¹⁵⁹ Furthermore, the supervisor noted that "when she had a Hispanic . . . answer the phones, she had complaints from customers who were not able to understand him."¹⁶⁰ As a result of this experience, the supervisor decided not to let Yu answer the phones. Unlike the court in *Fragante*, however, the EEOC rejected the agency's customer preference arguments, noting that Yu testified at an administrative hearing where the administrative judge had no problems understanding her. ¹⁶¹ In this case, the EEOC reversed the agency's final decision.¹⁶²

As indicated above, the EEOC has recently introduced new guidelines regarding accent discrimination. While the EEOC admonishes employers to "carefully scrutinize" decisions they make based on an individual's accent,¹⁶³ the example that is given by the EEOC about when employment decisions based on accent do not violate Title VII is confusing at best. The following example is given by the EEOC, where the EEOC believes the employee's accent materially interferes with performing the functions of the job, and at least in that context customer preferences apparently are acceptable bases for decision making:

A major aspect of Bill's position as a concierge for XYZ Hotel is assisting guests with directions and travel arrangements. Numerous people have complained that they cannot understand Bill because of his heavy Ghanaian accent. Therefore, XYZ notifies Bill that he is being transferred to a clerical position that does not involve extensive spoken communication. The transfer does not violate Title VII because Bill's accent materially interferes with his ability to perform the functions of the concierge position.¹⁶⁴

The example seems to be in conflict with the statement that "employers may not rely on coworker, customer, or client discomfort or preference as the basis for a discriminatory action."¹⁶⁵ The conclusion that Bill's accent "materially interferes" with his ability to perform his duties as concierge appears to be wholly based on the preferences of the hotel guests. Curiously, based on the example, Bill was obviously hired by someone who did not think that Bill's accent was too heavy to perform the job of concierge. Again, in a country where more and more individuals do not claim English as their first language, do we really want to allow customers or co-workers to decide—or at least influence—what type of jobs an individual can or cannot do? As I have indicated above, I believe the

¹⁵⁹ *Id.* at *3.

¹⁶⁰ *Id.* at *4.

¹⁶¹ *Id.*

¹⁶² *Id.* at *6.

¹⁶³ National Origin Interpretive Manual, *supra* note 70, at 622:0008.

¹⁶⁴ *Id.* at 622:0009.

¹⁶⁵ *Id.* at 622:0004.

answer to this question should be no, and therefore I believe all customer preference arguments that speak against the comprehensibility of an accented person's communication skills should be excluded at trial, unless the plaintiff uses them to show bias on part of the defendant and to ultimately prove discriminatory conduct.¹⁶⁶ Instead of lay persons' preferences, the focus should be on the evaluations of linguistic experts in regards to the plaintiff's speech. In addition, I believe this assertion is supported by the findings of linguistic research in the area of listener prejudice.

B. Listener Prejudice Toward the Accented Speaker

A number of studies have analyzed how native speakers perceive the speech of non-native speakers.¹⁶⁷ Studies have shown that persons with a foreign accent from certain countries were perceived to be "significantly less successful."¹⁶⁸ For example, a Swedish study demonstrated that when the listener was told the accent they heard was from a Kurd, the speaker was perceived as less successful than when the listener was told that the speaker was German, although the same person was speaking.¹⁶⁹ Linguists have found that native speakers will often attach "cultural meanings to an accent which derive from the stereotypes and prejudices that the listener holds toward the race or ethnic group associated with that accent."¹⁷⁰ Speakers with accents of Western European countries, for example, appear to be less discriminated against than non-native speakers from

¹⁶⁶ See *supra* note 19. As indicated earlier this exclusion should be done statutorily, because EEOC interpretations, and guidelines in general, are too often ignored by the courts. See, e.g., *Sutton v. United Airlines, Inc.*, 527 U.S. 471, 482 (1999) (rejecting EEOC guidelines in ADA case); Theodore W. Wern, *Judicial Deference to EEOC Interpretations of the Civil Rights Act, the ADA, and the ADEA: Is the EEOC a Second Class Agency?*, 60 OHIO ST. L.J. 1533 (1999) (concluding that the EEOC interpretations receive less deference by courts than other those of other agencies). For a good discussion of the EEOC's role and procedure, see Michael Selmi, *The Value of the EEOC: Reexamining the Agency's Role in Employment Discrimination Law*, 57 OHIO ST. L.J. 1 (1996).

¹⁶⁷ See, e.g., Una Cunningham-Andersson, *Native Speaker Reactions to Non-Native Speech*, in *SECOND-LANGUAGE SPEECH: STRUCTURE AND PROCESS* 133-144 (Allan James & Jonathan Leather eds., 1997); Eileen Brennan & John S. Brennan, *Measurements of Accent and Attitude Toward Mexican American Speech*, 10 J. PSYCHOLINGUISTIC RES. 487 (1981); Peggy M. Schmid & Grace H. Yeni-Komshian, *The Effects of Speaker Accent and Target Predictability on Perception of Mispronunciation*, 42 J. SPEECH, LANGUAGE & HEARING RES. 56 (1999).

¹⁶⁸ Cunningham-Anderson, *supra* note 167, at 133.

¹⁶⁹ *Id.*

¹⁷⁰ Nguyen, *supra* note 14, at 1335.

less developed countries.¹⁷¹ This notion is supported by a review of a number of court cases that show that a great number of accent discrimination cases involve plaintiffs from third world countries.¹⁷² However, while cases dealing with accented speakers from Europe are not as prevalent, this does not mean that courts should scrutinize these cases any less rigorously than cases involving accents from other regions of the world.¹⁷³

One of the most overt cases concerning employer discrimination against accented speakers is *Carol v. Elliott Personnel Services*.¹⁷⁴ In this case a secretary for an employment agency, Doritt Caroll, was directed by her manager to screen inquiries over the phone. Callers that did not "speak right" were not offered a job and the secretary was asked to keep a record of the callers' speech and accent.¹⁷⁵ Reasons why employers might discriminate against an accented

¹⁷¹ Nguyen, *supra* note 14, at 1335 n.57 (citing Steven A. Holmes, *U.S. Sues Company Over Language Firing; India-Born Credit Manager Had Accent*, HOUSTON CHRON., Jan. 18, 1992, at A7.)

¹⁷² See, e.g., Raad v. Fairbanks North Star Borough Sch. Dist., 323 F.3d 1185 (9th Cir. 2003) (Lebanon); Hasham v. Cal. State Bd. of Equalization, 200 F.3d 1035 (7th Cir. 2000) (Pakistan); Fragante v. City & County of Honolulu, 888 F.2d 591 (9th Cir. 1989) (Philippines); Ogodor v. City of New York, No. 98 Civ. 5353 (LAK) (RLE), 2001 U.S. Dist. LEXIS 2026 (S.D. N.Y. Feb. 26, 2001) (Nigeria); Poskocil v. Roanoke County Sch. Div., No. 98-0216-R, 1999 U.S. Dist. LEXIS 259 (W.D. Va. Jan. 11, 1999) (Columbia); Hassan v. Auburn Univ., No. 92-D-518-E, 1993 833 F. Supp. 866 (M.D. Al. 1993) (Egypt); Al-Hashimi v. Scott, 756 F. Supp. 1567 (S.D. Ga. Jan. 31, 1991) (Iraq).

¹⁷³ One case involving a plaintiff with a European accent is *Marks v. U.S. West Direct*, 988 F.Supp. 1371 (D. Col. 1998). The plaintiff in *Marks*, a native of France, argued that she did not receive a promotion, because she was discriminated against on the basis of age and her foreign accent. Plaintiff charged that a number of comments made by her supervisor, who apparently told plaintiff to "learn to speak English" and "[l]et me talk slowly so you understand," were discriminatory. *Id.* at 1375. The court rejected all of plaintiff's claims and granted defendant's motion for summary judgment, in part because the plaintiff admitted during trial that the supervisor who made the comments was supporting her in obtaining a promotion. *Id.* at 1375-76. *But see* Berke, 1978 U.S. Dist. LEXIS 5088, at *20-21 (S.D. Ohio 1978) (holding that plaintiff, who had a Polish accent, was unlawfully rejected for a supervisory position by her employer because of her accent). A recent incident in the political arena also illustrates that prejudice against speakers with more "desirable" accents exists. Austrian-born actor Arnold Schwarzenegger was teased about his accent by his rival, Governor Gray Davis, in the 2003 California gubernatorial election. At a campaign stop Davis told potential voters that "[y]ou shouldn't be governor unless you can pronounce the name of the state." Charlie LeDuff, *In California, Davis and Schwarzenegger Split the Pronunciation Vote*, N.Y. TIMES, Sept. 9, 2003, at A26. After public pressure, Davis apologized for the inappropriate comment. Gregg Jones, *Governor Apologizes for Remark About Accent*, L.A. TIMES, Sept. 11, 2003, at A21.

¹⁷⁴ *Carroll v. Elliot Personnel Servs., Inc.*, CIV. No. H-89-1918, 1989 WL 167678 (D. Md. Nov. 22, 1989).

¹⁷⁵ *Id.* at *1.

speaker may be because of their own prejudices, but another likely reason may be because they feel pressured by their customers. While customer preference defenses have been rejected in the majority of Title VII cases,¹⁷⁶ they are still allowed in accent cases, as illustrated in *Poskocil* and *Fragante*.¹⁷⁷

Moreover, hostility by some individuals toward accented speakers will likely mean that employers will continue to include customer preference as a defense if courts allow defendants to do so. Perceived problems on the part of customers with employees who are L2 speakers are widely documented. Whether it is at the doctor's office or fast-food drive-throughs, native speaking customers are apparently "frustrated" more than ever by having to "communicate with people who aren't from here."¹⁷⁸ However, one should not read too much into these "frustrations." As linguist Rosina Lippi-Green's notes, "breakdown of communication is due not so much to accent as it is to negative social evaluation of the accent in question, and a rejection of the communicative burden" on the part of the listener.¹⁷⁹ Moreover, this assertion is supported by other research that shows that "a strong foreign accent does not necessarily reduce the intelligibility or comprehensibility of speech produced by non-native speakers."¹⁸⁰ Based on the discussion above, it appears clear that the accented speaker faces a number of

¹⁷⁶For example, EEOC regulations concerning gender discrimination allow a customer preference defense to be a BFOQ only when discriminatory hiring is necessary for authenticity or genuineness, as in the case of actors and actresses. 29 C.F.R. § 1604.2(a)(2) (2004). The limit of this customer preference defense for gender is shown in *Diaz*, 442 F.2d at 385–87. In *Diaz*, a male applicant for a position as flight attendant was rejected by the airline, because Pan Am believed that woman were better at "non-mechanical aspects of the job," such as serving and reassuring anxious passengers. *Id.* at 387. Pan Am maintained that gender was a BFOQ in this case, however the Fifth Circuit rejected this argument, noting that such customer preferences reflected the "very prejudices [Title VII] was meant to overcome." *Id.* at 389. For more on *Diaz* see *supra* note 137–40 and accompanying text.

¹⁷⁷See *supra* notes 2–8 and accompanying text for a detailed discussion about the *Poskocil* case. The *Fragante* case is discussed in detail in Part II.D. See also *supra* note IV.A (discussing cases where customer preference arguments were raised by defendant).

¹⁷⁸Gary Strauss, *Can't Anyone Here Speak English? Consumers Frustrated by Verbal Gridlock*, USA TODAY, Feb. 28, 1997, at 1A. The article includes a number of testimonials from customers who have had bad experiences with people "who spoke poor English." For example, a Ohio customer experienced the following at a fast food store: "You're sitting there trying to order McNuggets. How can someone not understand that? You just get fed up and drive off." Another unhappy experience occurred when a "barber who spoke poor English" was told to give a twelve-year-old a "trim." The boy came home with a shaved head. *Id.* However, it needs to be pointed out that in the incidents listed above the non-native speakers apparently had more than just heavy accents, but rather were beginners of speaking English. Moreover, every day experiences tell us that these misunderstandings can happen even when both the customer and the employee are native speakers.

¹⁷⁹LIPPI-GREEN, *supra* note 86, at 71.

¹⁸⁰Schmid & Yeni-Komshin, *supra* note 167, at 57.

challenges to fully participate in the U.S. labor market. One of the tools to discourage employers to discriminate against non-native speakers is to disallow employer and customer preference defenses.

V. ANALYSIS: ABOLISHING THE CUSTOMER PREFERENCE DEFENSE IN TITLE VII ACCENT CASES

This exclusion of the customer preference defense in accent discrimination cases should be seen as part of a greater movement of shifting the burden from having the immigrant make herself understandable to others, to encouraging others to make an effort to understand her. Disallowing defendants to use the customer preference defense would be a first step in tilting the scale in favor of the plaintiff in accent discrimination cases. While the customer preference defense is routinely rejected in other Title VII cases,¹⁸¹ a review of accent discrimination cases, as seen in *Poskocil* and *Fragante*, demonstrate that the defense is successfully used by the defendant.¹⁸² By disallowing statements into evidence about what customers apparently prefer or what employers think their customers or clients want, the plaintiff has a better chance of being successful with her claim. In the case of *Sophia Poskocil*, it was the students who complained to the school district that they had a difficult time understanding her.¹⁸³ By rejecting this kind of evidence as inadmissible, the court will be forced to focus more of its time and analysis on whether or not the plaintiff's language skills are in fact unsatisfactory. I am mindful about the fact that in the end the courts might very well come out the same way as they did in both *Poskocil* and *Fragante*, but the concentration of the inquiry will inevitably have to focus on more objective criteria. Perhaps more importantly, the plaintiff, even if she loses her case, will likely not feel the same alienation she feels when the case centers around individuals complaining about her accent.¹⁸⁴ Moreover, the fact that most immigrants will never lose their accent further supports the idea that accent

¹⁸¹ See *supra* notes 137–39 and accompanying text.

¹⁸² For a detailed discussion of the *Poskocil* case see *supra* notes 2–8 and accompanying text. For a discussion of the *Fragante* case see *supra* Part II.D.

¹⁸³ See *supra* note 5 and accompanying text (discussing student evaluations).

¹⁸⁴ Linguists Coates and Regdon suggest that immigrants suffer from their inability to at least linguistically assimilate in their new home country. They note that accented speakers of English are seen by native speakers as being inferior and that the difficulty of assimilation can lead to a lack of self worth on the part of the immigrants. Coates & Regdon, *supra* note 116, at 364.

discrimination cases need to be at least as fair in terms of process as cases dealing with race and gender.¹⁸⁵

While the focus of this Note has been primarily on the linguistic and economic arguments for lowering the burden of proving accent discrimination, as suggested above there are also potential psychological repercussions for those individuals that are being discriminated against.¹⁸⁶ The effects of discrimination on the victim may include loss of self-esteem,¹⁸⁷ anger, depression, anxiety, and feelings of abandonment.¹⁸⁸ Moreover, these mental effects on the discriminated person often lead to other problems, including disrupting personal relationships¹⁸⁹ and even physical health problems.¹⁹⁰ As implied by the quote of Young Park at the beginning of this Note, sounding different than the majority of speakers may have a psychological impact on the accented speaker, even if there is no perceived or actual discrimination.¹⁹¹ Facing discrimination—and the limited opportunity to advance in one's job that comes with that discrimination—many immigrants have turned to expensive speech classes to reduce their accent.¹⁹² These classes tend to

¹⁸⁵ For a discussion on why individuals develop accents when learning second and third languages see *supra* Part III.A. For a discussion about the customer preference defense see *supra* Part IV.A.

¹⁸⁶ See, e.g., Vita Rabinowitz, *Coping with Sexual Harassment*, in *SEXUAL HARASSMENT ON COLLEGE CAMPUSES: ABUSING THE IVORY TOWER* 206–08 (Michele A. Paludi ed., 1996) (discussing the psychological effect that sexual harassment has on female college students); Edith Green & Jane Goodman-Delahunty, *Diagnosis of Psychological Impairment in Employment Discrimination Claims*, 13 *BEHAVIORAL SCI. LAW* 459, 459 (1995) (noting that employment discrimination can be “as intense, protracted and traumatizing as the most vitriolic divorce”); Elizabeth A. Klonoff et al., *Racial Discrimination and Psychiatric Symptoms Among Blacks*, 5 *CULTURAL DIVERSITY & ETHNIC MINORITY PSYCH.* 329, 329–30 (1999) (discussing psychological impact discrimination has on African-Americans in a variety of settings, including in employment, housing, and health and human services); Jean R. Sternlight, *In Search of the Best Procedure for Enforcing Employment Discrimination Laws: A Comparative Analysis*, 78 *TUL. L. REV.* 1401, 1474 (2004) (noting in part that the economic problems that people who have been discriminated against suffer “may also enhance the[ir] psychological problems”).

¹⁸⁷ See, e.g., *supra* note 184 (discussing linguistic assimilation problems of immigrants).

¹⁸⁸ Rabinowitz, *supra* note 186, at 206–08; Klonoff, *supra* note 186, at 330; Sternlight, *supra* note 186, at 1475.

¹⁸⁹ Sternlight, *supra* note 186, at 1475.

¹⁹⁰ See Samuel Noh & Violet Kaspar, *Perceived Discrimination and Depression: Moderating Effects of Coping, Acculturation, and Ethnic Support*, 93 *AM. J. PUB. HEALTH* 232, 232 (Feb. 2003) (discussing study that found that passive coping mechanisms of African American women toward racism “were associated with high blood pressure”).

¹⁹¹ *Coming to America*, *supra* note 1. This is also suggested by linguists Coates and Regdon. Coates & Regdon, *supra* note 116, at 364. See also *supra* note 184.

¹⁹² See, e.g., Martha Bridegam, *It's All a Manner of Speaking*, *L.A. TIMES*, Nov. 22, 1990, at E32 (noting that one accent reduction program charged \$700 per person for a 13-week class for five people (1990 dollars)); Kelly Hearn, *Pegged By an Accent*, *CHRISTIAN SCIENCE*

be expensive and their success in reducing an individual's accent is disputed.¹⁹³ The question is why should an immigrant have to spend time and money on reducing his accent? If the accented speaker is taking accent reduction classes to gain greater self confidence with the English language, there will be very little objection to this. However, it is more problematic when these classes are taken solely to progress up the career ladder. Issues of fundamental fairness come into play when people are virtually forced to give up their mother-tongue to conform to employer and customer expectations of what an individual's English should sound like by discrimination against the accented speaker of English.¹⁹⁴ Moreover, there are advantages to maintaining the mother tongue, since it allows individuals to retain some of their distinctive culture and "adapt more gradually to the ways of majority Americans than would be the case if they lost their mother-tongue."¹⁹⁵

The argument for greater tolerance for accented speakers in the workplace is strengthened by the fact that many organizations increasingly rely on written rather than verbal communication.¹⁹⁶ This increased reliance on written

MONITOR, Dec. 18, 2000, at 11 (noting that accent reduction classes are growing in popularity among immigrants); Gary Libman, *Plain Talk*, L.A. TIMES, Feb. 2, 1989, at V1 (noting that "thousands" of immigrants are taking accent reduction courses); Lee Romney, *Learning P's and Q's of American English*, L.A. TIMES, May 15, 1994, at A1 (stating that some students at speech classes suspect that the complaints that they have received from other about their accent is motivated by discrimination); Eric Zorn, *Pronounced Improvement*, CHIC. TRIB. MAG., Oct. 28, 1990 at 24 (stating that most of the students at a speech program were Hispanic or Asian, but also include "Eastern Europeans, Filipinos, Southerners who wish to drop their twang and black students hoping to lose the dialectical edge to their speech").

¹⁹³ According to linguist Rosina Lippi-Green, claims by accent reduction classes to eliminate accents "is an insupportable claim." See LIPPI-GREEN, *supra* note 86, at 140. Moreover, these classes can be primarily found in the New York and in southern States and are frequented by accented professionals. *Id.* at 140. While claims of completely eradicating one's accent seem unsupportable, claims of a 50% reduction in accent seem more realistic. Hearn, *supra* note 192, at 16.

¹⁹⁴ ANGLE, *supra* note 28, at 4.

¹⁹⁵ *Id.* However, whether there is an economic benefit to being bilingual is unclear, at least when your native language is not English. For example, a Canadian study suggests that speaking both French and English, rather than just English, has no benefit in terms of earning higher wages. In fact, native French-speaking Canadian men still earned less after learning English than their monolingual English speaking Canadian counterparts. Geoffrey Carliner, *Wage Differences by Language Group and the Market for Language Skills in Canada*, J. HUMAN RESOURCES 384 (1981).

¹⁹⁶ See, e.g., HARRIS, *supra* note 27, at 117 (noting the importance and increased reliance on written communication within organizations, but also suggesting that management prefers verbal over written communication). A 1996 study of American corporations asked about the most frequently used methods of communication. The study showed that roughly two-thirds of

communication can be attributed to technological advancement.¹⁹⁷ The use of e-mails and faxes have become common forms of written communication and in many ways have reduced or replaced the need for verbal communication for a number of employment positions.¹⁹⁸ However, I do not mean to suggest that the verbal communication and the need for face-to-face interaction are not important. On the contrary, I strongly believe that human interaction at work is vital and, as discussed below, obviously an important avenue for the native speaker to familiarize herself and get used to accented speech.¹⁹⁹ Moreover, commentators have noted that the lack of face-to-face interaction can seriously undermine an organization's cohesiveness and the mental health of an organization's employees.²⁰⁰ But, as a result of the greater reliance of written work in the employment setting, a person's writing skills have become more important. As I suggested above, many non-native speakers of English that come to the United States will have stronger writing skills than native English speakers, making numerous immigrants more employable than their American-born counterpart on that basis alone.²⁰¹

One thing employers may want to consider when thinking about how to reduce accent discrimination is offering "cross-cultural awareness training and

communications were in written form, including via regular and overnight/express mail, e-mail, and fax. Barbara Ettorre, *Communication Breakdown*, 85 MGMT. REV. 10 (June 1996).

¹⁹⁷ See, e.g., Edward M. Hallowell, *The Human Moment at Work*, HARV. BUS. REV., Jan-Feb. 1999, at 61 (stating that "in the last ten years or so, technological changes have made a lot of face-to-face interaction unnecessary"); HARRIS, *supra* note 27, at 117 (noting that "[t]he digital age utilizes electronically transferred symbols increasing our reliance on various forms of written communication").

¹⁹⁸ This seems especially true for administrative positions. See Ettorre, *supra* note 196 (indicating most popular methods of communication).

¹⁹⁹ See *infra* notes 202-204 and accompanying text.

²⁰⁰ Hallowell, *supra* note 197, at 60-61. On a broader scale, Austrian author Wolfgang Kraus has suggested that the bureaucratization of society has isolated individuals. Kraus advocates greater "self and active love for one's neighbor," in order to combat the disappearance of individuality. WOLFGANG KRAUS, *THE RETURN OF THE INDIVIDUAL: RESCUE ATTEMPTS IN A BUREAUCRATIC AGE* 167 (John Russell trans., 1985). For a critique of this bureaucratization and de-individualization in fictional literature see for example FRANZ KAFKA, *THE TRIAL* (Breton Mitchell trans., 1998); CARL ZUCKMAYER, *THE CAPTAIN OF KÖPENICK* (John Clifford Mortimer trans., 1971). See also Gerrit B. Smith, *Criticism of the Weberian Bureaucracy: Carl Zuckmayer's The Captain of Köpenick* (1999) (unpublished M.A. thesis, University of Hawaii) (on file with the University of Hawaii at Manoa Library) (analyzing Zuckmayer's work as a criticism of the Weberian ideal type of bureaucracy).

²⁰¹ This of course assumes that the American-born person's first language is English. See *supra* note 90 (citing sources that support the idea that some non-native speakers will have better command of grammar usage and spelling than native English speakers).

explicit linguistic instruction” on how to comprehend foreign accented-speech.²⁰² Studies show that exposing native speakers to accented speech improved comprehension on the part of native speakers.²⁰³ Besides increasing comprehensibility, native speakers also become more tolerant of listening to accented speech.²⁰⁴ Based on these studies, offering employees linguistic instruction and cross cultural-awareness training is a wise investment, especially since the labor market will continue to increase in terms of linguistic diversity.

VI. CONCLUSION

Over twenty years ago, a linguist asked “[w]hy, in a country of immigrants, many if not most of whom where not able to speak English when they arrived, would the matter of discrimination against people with accents not have become a matter of public concern?”²⁰⁵ Today that question still rings true, as evidenced by the continued use of the customer preference defense in Title VII accent discrimination cases and the overall lack of protection for non-native speakers of English. This Note has argued for a re-thinking of the way the justice system approaches these cases, based in part on the fact that accent is an immutable trait for many immigrants who learn English later in life. Moreover, the United States is experiencing a high influx of immigrants into its workforce and the importance of that influx on economic expansion must not be underestimated.²⁰⁶

By discriminating against individuals just because their way of speech appears different, forcing us to concentrate and strain ourselves a bit to comprehend that speech, the United States only injures itself in the long run—culturally and economically. By approaching non-native speakers of English with greater tolerance and ensuring equal treatment under the law when questions arise as to whether or not they have been discriminated against, immigrants will be able to reach their fullest potential. Furthermore, the population as a whole should celebrate the linguistic diversity that has historically characterized the United States. By disallowing the customer preference defense in Title VII accent discrimination cases, a small step toward these goals will have been realized.

²⁰² Derwing, *supra* note 24, at 245.

²⁰³ *Id.* at 246–47.

²⁰⁴ *Id.* at 254. After undergraduate students were given awareness training and linguistic instruction, their attitude toward accented speech changed considerably. Student comments after the training included the following: “I tend to listen and give myself time to listen and understand. I appreciate the difficulties that people have speaking with an accent.” *Id.*

²⁰⁵ Angle, *supra* note 28, at 2.

²⁰⁶ By the year 2050, the total number of minorities, many of whom are going to be foreign born, will constitute about half of the United States population. It is projected that in 2050 Hispanics will make up about 23% of the population, African-Americans will constitute 15% of the total population, and Asians will make up about 10% of the entire U.S. population. Toossi, *supra* note 112, at 23.

